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Attorneys for Defendant
7 Bank of America N.A., successor in interest to
Bank of America NT & SA
8

9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11

12 JOHN L. WHEELER; GLORIA A.
13 WHEELER,

14 Plaintiffs,

15 v.

16 BANK OF AMERICA NT & SA;
LIBERTY REVERSE MORTGAGE;
17 SEATTLE FINANCIAL GROUP,

18 Defendants.
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Case No. C-08-03230-JL

**DECLARATION OF AARON M.
ROFKAHR IN SUPPORT OF
DEFENDANT BANK OF BANK OF
AMERICA'S MOTION TO STAY
PROCEEDINGS**

1 I, Aaron M. Rofkahr, declare as follows:

2 1. I am an attorney with the law firm of O'Melveny & Myers LLP,
3 counsel of record for defendant Bank of America, N.A, successor in interest to Bank of
4 America NT & SA ("Bank of America"). The matters set forth herein are true and correct
5 based upon my own personal knowledge or based upon my review of public documents
6 and, if called as a witness, I could and would testify competently thereto. I submit this
7 declaration in support of Bank of America's Motion to Stay Proceedings.

8 2. O'Melveny & Myers LLP is counsel of record in the case of *Miller v.*
9 *Bank of America N.T. S.A.*, Case No. S149178, which is currently pending before the
10 California Supreme Court. Attached hereto as Exhibit A is a true and correct copy of the
11 California Supreme Court's online docket in *Miller*.

12 3. On August 13, 1998, plaintiff Paul Miller filed a class action in
13 Alameda County against Bank of America N.T. & S.A., predecessor to Bank of America
14 N.A. ("Bank of America") entitled *Miller v. Bank of America*, Alameda Superior Court
15 Case No. 801882-1 ("*Miller*"). In September 1998, he filed a First Amended Complaint,
16 which became the operative complaint in *Miller*. On the Bank's motion, the action was
17 transferred from Alameda to San Francisco, and became *Miller v. Bank of America*, San
18 Francisco Superior Court Case No. CGC-99-301917. Attached hereto as Exhibit B is a
19 true and correct copy of the operative First Amended Complaint in *Miller*.

20 4. Among the various defenses that Bank of America asserted during
21 the course of the *Miller* litigation were the following:

22 a. Charging standard account fees and clearing overdrafts within
23 an account are not creditor "setoffs" of debts and therefore are not forbidden by
24 *Kruger v. Well Fargo Bank* 11 Ca1.3d 352 (1974), which did not even address
25 account fees or overdrafts. Rather, fees and overdrafts are the simple arithmetic of
26 exchanging contractual considerations and balancing accounts, i.e., adding pluses
27 and subtracting minuses. (*Kruger*, by contrast, involved an entirely different
28

1 situation, where a bank set off an outside debt, namely, a delinquent credit card
2 balance, against a checking account)

3 b. California Financial Code section 864, enacted the year after
4 *Kruger*, prescribes a comprehensive set of rules governing banks' setoffs of debts
5 against accounts (including accounts receiving Social Security and government
6 benefits), and explicitly excludes account fees and overdrafts from the definition of
7 debts that are subject to the setoff exemption restrictions. Cal. Fin. Code § 864
8 (a)(2). Otherwise, before a bank could ever charge a fee of any sort, it would have
9 to mail the customer a statutory setoff notice, which could then precipitate a court
10 hearing to determine whether the fee could be charged.

11 c. Forbidding banks from balancing the accounts of Social
12 Security recipients would force banks to change the terms of those accounts in a
13 way that would make Social Security recipients second-class bank customers. For
14 instance, banks would have to bounce all their NSF checks, refuse to provide them
15 overdraft protection, cancel their ATM cards and limit their ability to make
16 deposits.

17 d. If California law did indeed prohibit banks from charging fees
18 or clearing overdrafts in customers' accounts, it would be preempted by the
19 National Bank Act and federal banking regulations. In *Lopez v. Washington Mutual*
20 *Bank, F.A.*, 302 F.3d 900, amended on denial of rehearing, 311 F.3d 928 (9th Cir.
21 2002), the Ninth Circuit held that state-law claims by Social Security recipients
22 asserting exemption from NSF fees if they happened to live in California were
23 preempted by federal law governing federal savings associations. 302 F.3d at 906-
24 907.

25 e. Account fees are part of the contractual consideration to which
26 customers agreed in exchange for the Bank's maintaining their accounts. *Lopez*,
27 302 F.3d at 904.

28

1 5. Attached hereto as Exhibit C is a true and correct copy of the
2 Judgment in *Miller v. Bank of America*, Case No. 301917, filed on March 4, 2005, in the
3 Superior Court of the State of California for the County of San Francisco.

4 6. Attached hereto as Exhibit D is a true and correct copy of the
5 Decision reversing the trial court's Judgment in *Miller*, filed on November 20, 2006, in
6 the California Court of Appeal for the First Appellate District.

7 7. Attached hereto as Exhibit E is a true and correct copy of the
8 complaint captioned *Anderson v. Bank of America, NT & SA et al.*, Case No. CGC-05-
9 438769 ("*Anderson*"), filed February 17, 2005 in the California Superior Court for the
10 County of San Francisco.

11 8. On July 26, 2005, Bank of America filed a motion to stay the
12 *Anderson* case pending the appeal in *Miller*. The Bank argued that because the legal
13 issues and theories of recovery were identical to those advanced in *Miller*, that the court
14 should stay the *Anderson* case in order to eliminate the risk of conflicting rulings,
15 prejudice to the defendant, and the waste of judicial resources. On October 25, 2005, the
16 trial court stayed the *Anderson* matter pending the resolution of the *Miller* appeal.
17 Attached hereto as Exhibit F is a true and correct copy of the Order Granting Bank of
18 America NT & SA's Motion to Stay the Proceedings in *Anderson*.

19 9. Attached hereto as Exhibit G is a true and correct copy of the
20 complaint captioned *Wheeler v. Bank of America, NT & SA et al.*, Case No. RG-08-
21 389597, filed May 28, 2008 in the California Superior Court for the County of Alameda.

22 I declare under penalty of perjury under the laws of the State of California that
23 the foregoing is true and correct
24
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Executed this 11th day of July, 2008, at San Francisco, California.

By: _____/s/
Aaron M. Rofkahr
Attorneys for Defendant
Bank of America N.A.

SF1:721480.1

EXHIBIT

A

CALIFORNIA APPELLATE COURTS

Case Information

Supreme Court

Supreme Court

Change court ☐

Welcome

Court data last updated: 07/02/2008 09:53 AM

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Docket (Register of Actions)

Calendar

MILLER v. BANK OF AMERICA

Help

Case Number S149178

Opinions



Date	Description	Notes
12/29/2006	Petition for review filed	Paul Miller, Plaintiff and Appellant by James C. Sturdevant, counsel
01/03/2007	Record requested	
01/05/2007	Request for extension of time filed (AA)	to February 1, 2007 to file respondents - Bank of America, NT & SA answer to petition for review.
01/08/2007	Received Court of Appeal record	file jacket/briefs/loose papers/four boxes
01/10/2007	Extension of time granted	On application of respondent, Bank of America, N.A. and good cause appearing, it is ordered that the time to serve and file the answer to the petition for review is extended to and including January 26, 2007.
01/24/2007	Received:	amended proof of service for respondent's amicus letter.
01/26/2007	Answer to petition for review filed	Bank of America, NT & SA, respondents by Debra S. Belaga, counsel
02/05/2007	Reply to answer to petition filed	Paul Miller, appellant by James C. Sturdevant, counsel
02/15/2007	Time extended to grant or deny review	The time for granting or denying review in the above-entitled matter is hereby extended to and including March 29, 2007, or the date upon which review is either granted or denied.
03/21/2007	Petition for review granted (civil case)	The applications to appear as counsel pro hac vice are granted. The petition for review is GRANTED. Chin, J., was recused and did not participate. Votes: George, C. J., Kennard, Baxter, Werdegarr, Moreno and Corrigan, JJ.
03/21/2007	Letter sent to:	counsels
04/05/2007	Certification of interested entities or persons filed	Debra S. Belaga, O'Melveny & Myers LLP for appellants Bank of America
04/05/2007	Request for extension of time	to June 1, 2007 to file appellants opening brief on the merits by James C. Sturdevants, counsel

	filed (AA)	
04/11/2007	Certification of interested entities or persons filed	Paul Miller, appellant James C. Sturdevant, counsel
04/13/2007	Extension of time granted	On application of appellant, Paul Miller, and good cause appearing, it is ordered that the time to serve and file the opening brief on the merits is extended to and including June 1, 2007.
06/01/2007	Opening brief on the merits filed	counsel for plf. and aplt. (Miller)
06/15/2007	Request for extension of time filed (AA)	Respondent, Bank of America requesting 43 days to August 13, 2007 to file answering brief on the merits. by Jonathan D. Hacker, counsel
06/20/2007	Extension of time granted	to August 13, 2007 to file appellant (Bank of America, NT & SA.) answer brief on the merits.
07/19/2007	Request for extension of time filed (AA)	Appellant (Bank of America) requesting an additional 30 day to September 12, 2007 to file answerw brief on the merits. by Johnathan D. Hacker, counsel
07/24/2007	Extension of time granted	to September 12, 2007 to file appellant (Bank of America) answer brief on the merits.
09/13/2007	Request for judicial notice filed (granted case)	Bank of America, respondent by Walter Dellinger, counsel
09/13/2007	Answer brief on the merits filed	Bank fo America, defendant and appellant by Walter Dellinger, counsel crc.8.25(b)
09/19/2007	Request for extension of time filed (AA)	Appellant (Paul Miller) requesting extension till October 22, 2007 to file reply brief on the merits. by James C. Sturdevant, counsel
09/25/2007	Extension of time granted	On application of appellants and good cause appearing, it is ordered that the time to serve and file the reply brief on the merits is extended to and including October 22, 2007.
09/26/2007	Request for extension of time filed (AA)	Appellant requesting extension till October 22, 207 to file opposition to Bank of America's request for judicial notice. by James C. Sturdevant, counsel
10/01/2007	Extension of time granted	On application of appellants (Paul Miller) and good cause appearing, it is ordered that the time to serve and file the opposition to Bank of America's request for Judicial Notice is extended to and including October 22, 2007.
10/09/2007	Request for extension of time filed (AA)	Paul Miller - respondents and cross-appellants requesting extension of time till November 16, 2007, to file reply brief on the merits and opposition to Bank of America's request for Judicial Notice by James C. Sturdevant, counsel
10/15/2007	Extension of time granted	On application of plaintiffs and appellants and good cause appearing, it is ordered that the time

		to serve and file the reply brief on the merits and opposition to defendant and appellant's request for judicial notice is extended to and including November 16, 2007.
11/16/2007	Application to file over-length brief filed	Paul Miller, respondents and cross-appellants by James C. Sturdevant, counsel
11/16/2007	Opposition filed	respondent and cross-appellant - Paul Miller's opposition to Bank of America's request for judicial by James C. Sturdevant, counsel
11/16/2007	Request for judicial notice filed (granted case)	Paul Miller, respondents and cross appellants by James C. Sturdevant, counsel
11/19/2007	Reply brief filed (case fully briefed)	Paul Miller, respondent and cross-appellants by James C. Sturdevant, counsel with permission
11/19/2007	Opposition filed	Bank of America, appellants and cross-respondents by Jonathan D. Hacker
12/17/2007	Received application to file amicus curiae brief	California Bankers Association in support of appellants and cross-respondents Bank of America. by Jonathan R. Bass, counsel
12/17/2007	Received application to file amicus curiae brief	AARP, Congress of California Seniors, National Consumer Law Center, National Senior Citizen's Law Center and Western Center on Law & Poverty in support of respondent and cross-appellant - Paul Miller. by Barbara Jones, counsel
12/17/2007	Received application to file amicus curiae brief	American Bankers Assn, Consumer Bankers Assn, Credit Union National Assn, Financial Services Roundtable & Independent Community Bankers of America Attorney Laurence J. Hutt [in support of apt Bank of America]
12/17/2007	Received application to file amicus curiae brief	The United State of America in support of appellants and cross-respondents Bank of America. by Thomas M. Bondy, counsel
12/17/2007	Received application to file amicus curiae brief	Center for Responsible Lending in support of respondent and cross-appellant - Paul Miller by Eric Halperin, counsel
12/18/2007	Received application to file amicus curiae brief	The California Reinvestment Coalition in support of respondent and cross-appellant Paul Miller. by Arthur D. Levy, counsel
12/20/2007	Received application to file amicus curiae brief	National Association of Consumer Advocates in support of appellant - Paul Miller. by Robert M. Bramson, counsel crc.8.25(b)
12/24/2007	Received application to file amicus curiae	Iowa Attorney General Thomas A. Miller in support of appellant Paul Miller. by Jeffrey L. Fazio, counsel

	brief	
12/24/2007	Received:	application to file late filing of applicaiton of Iowa Attorney General Thomas A. Miller in support of appellant Paul Miller. by Jeffrey L. Fazio, counsel
12/27/2007	Request for extension of time filed (AA)	Joint application for extension of time to respond to briefs submitted by amici curiae . Defendant and Appellant - Bank of American and Plaintiff and Appellant - Paul Miller jointly request an additional twenty-two days to and including January 29, 2008 to file and serve their respective replies to any amicus curiae briefs . by Jonathan D. Hacker and James Sturdevant, counsels
12/27/2007	Permission to file amicus curiae brief granted	California Bankers Association by Jonathan R. Bass
12/27/2007	Amicus curiae brief filed	The applicaiton of California Bankers Associaiton for permission to file an amicus curiae brief in support of appellant Bank of America is hereby granted. An answer thereto may be served and filed by any party within twenty days of the filing of the brief.
12/27/2007	Permission to file amicus curiae brief granted	AARP, NCLC, NSCLC, CCS and Western Center on Law & Poverty. by Barbara Jones, counsel
12/27/2007	Amicus curiae brief filed	The application of AARP, NCLC, NSCLC, CCS and Western Center on Law & Poverty for permission to file an amicus curiae brief in support of appelants Paul Miller, et al., is hereby granted. An answer thereto may be served and filed by any party within twenty days of the filing of the brief.
12/27/2007	Permission to file amicus curiae brief granted	American Bankers Associaiton, Consumer Bankers Association, Credit Union National Association, Financial Services Rountable, Independent Community Bankers of America. by Laurence J. Hutt, counsel
12/27/2007	Amicus curiae brief filed	The application of American Bankers Association, Consumer Bankers Association, Credit Union National Association, financial Services Roundtable, Independant Community Bankers of America for permission to file an amicus curiae brief in support of appellant Bank of America is hereby granted. An answer thereto may be served and filed by any party within twenty days of the filing of the brief.
12/27/2007	Permission to file amicus curiae brief granted	The United States of America. by Thomas Bondy.
12/27/2007	Amicus curiae brief filed	The application of The United State of America for permission to file an amicus curiae brief in support of appellant Bank of America is hereby

		granted. An answer thereto may be served and filed by any party within twenty days of the filing of the brief.
12/27/2007	Permission to file amicus curiae brief granted	Center for Responsible Lending. by Eric Halperin, counsel
12/27/2007	Amicus curiae brief filed	The application of Center for Responsible Lending for permission to file an amicus curiae brief in support of appellants Paul Miller, et al., is hereby granted. An answer thereto may be served and filed by any party within twenty days of the filing of the brief.
12/27/2007	Permission to file amicus curiae brief granted	California Reinvestment Coalition. by Arthur D. Levy, counsel
12/27/2007	Amicus curiae brief filed	The application of California Reinvestment Coalition for permission to file an amicus curiae brief in support of appellant Bank of America is hereby granted. An answer there to may be served and filed by any party within twenty days of the filing of the briefs.
12/27/2007	Permission to file amicus curiae brief granted	National Association of Consumer Advocates. by Robert M. Bramson, counsel
12/27/2007	Amicus curiae brief filed	The application of National Association of Consumer Advocates for permission to file an amicus curiae brief in support of appellants Paul Miller, et al., is hereby granted. An answer thereto may be served and filed by any party within twenty days of the filing of the brief.
12/28/2007	Received:	Application by California Credit Union League to join amicus Curiae brief of California Bankers Association. by Jonathan R. Bass, counsel
01/02/2008	Permission to file amicus curiae brief granted	California Credit Union League to join amicus curiae brief of California Banks Association. by Jonathan R. Bass, counsel with permission
01/02/2008	Amicus curiae brief filed	California Credit Union League by Jonathan R. Bass, counsel with permission
01/02/2008	Permission to file amicus curiae brief granted	Thomas A. Miller in support of appellant - Paul Miller. by Jeffrey L. Fazio, counsel
01/02/2008	Amicus curiae brief filed	The application of Thomas A. Miller for permission to file an amicus curiae brief in support of plaintiff and appellant Paul Miller is hereby granted. An answer thereto may be served and filed by any party within twenty days of the filing of the brief. With permission

01/02/2008	Extension of time granted	On application of plaintiff and appellant - Paul Miller and defendant and appellant - Bank of America, NT & SA, and good cause appearing, it is ordered that the time to serve and file the reply briefs filed in this case is extended to and including January 29, 2008.
01/04/2008	Note: Mail returned (unable to forward)	Jeffrey L. Fazio
01/14/2008	Note: Mail returned (unable to forward)	Jseffrey L. Fazio, counsel
01/15/2008	Change of contact information filed for:	James C. Sturdevant, counsel for plaintiff and appellant.
01/29/2008	Response to amicus curiae brief filed	Paul Miller, plaintiff and appellant by James C. Sturdevant, counsel
01/30/2008	Response to amicus curiae brief filed	Appellant Bank of America's Consolidated Response to Briefs of Amici Curiae Briefs by Walter Dellinger, O'Melveny & Myers LLP, counsel CRC 8.25(b)
01/31/2008	Received:	respondent's corrected table of authorities to answer brief to the amicus curiae briefs by James C. Sturdevant, counsel for appellant

[Click here to request automatic e-mail notifications about this case.](#)

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EXHIBIT

B

CASE ASSIGNMENT

CASE: PAUL MILLER V. BANK OF AMERICA

COURT: SUPERIOR

CASE NUMBER: 8018821

COUNTY: ALAMEDA STATE: CA

DOCUMENT TYPE: SUMMONS, COMPLAINT

SERVICE

How Received: PROCESS SERVER

Original Receiving unit: 13018

Date Received by Orig. Unit: 8/25/98

LITIGATION NORTH: Date Received: 8/25/98

Service Accepted by: CT

ASSIGNED TO: SPENCER

COMMENTS: APPEARANCE OR ANSWER DUE WITHIN THIRTY DAYS.

DATE ASSIGNED: 8/25/98

FROM: Janice M. Fetsch
Assistant General Counsel
Office of General Counsel
Litigation North #3017
Phone No. (415) 622-6835

ENTRY #: 115067 / JJM : JJM
(Printed 8/25/98 by JJM)

CASE ASSIGNMENT

CASE: PAUL J. MILLER V. BANK OF AMERICA

COURT:

CASE NUMBER:

COUNTY:

STATE: CA

DOCUMENT TYPE: THREATENED SUIT

SERVICE

How Received:

CERTIFIED MAIL

Original Receiving unit:

OFC GEN COUNSEL

Date Received by Orig. Unit:

8/15/98

LITIGATION NORTH:

Date Received:

8/19/98

Service Accepted by:

ASSIGNED TO

SPENCER

COMMENTS:

GREG, THIS IS THE MATTER WE TALKED ABOUT LAST WEEK. A LAWSUIT
HAS ALREADY BEEN FILED. -JANET FETSCH

DATE ASSIGNED:

8/19/98

FROM:

Janice M. Fetsch
Assistant General Counsel
Office of General Counsel
Litigation North #3017
Phone No. (415) 622-6835

ENTRY #: 115016 / JJM : JJM
(Printed 8/19/98 by JJM)

BOFA MOFO 018473



CT System

98 AUG 20 11:11:47

Service of Process Transmittal Form

Los Angeles, California

08/24/1998

Via Federal Express (2nd Day)

TO: DAYSI ROJAS
BANK OF AMERICA NT & SA
555 CALIFORNIA STREET
6TH FLOOR
SAN FRANCISCO, CA 94104

RE: **PROCESS SERVED IN CALIFORNIA**

FOR Bank of America NT & SA Domestic State: De
True Name : BankAmerica Corporation

ENCLOSED ARE COPIES OF LEGAL PROCESS RECEIVED BY THE STATUTORY AGENT OF THE ABOVE COMPANY AS FOLLOWS:

1. TITLE OF ACTION: Paul Miller vs Bank of America N.T. & S.A., et al
2. DOCUMENT(S) SERVED: Summons, Complaint, Notice, Alternative Dispute Resolution Procedures, Plaintiff's Statement, Declaration,
3. COURT: Superior Court of California, County of Alameda
Case Number 8018821
4. NATURE OF ACTION: Complaint for alleged damage for fraud, violation of California Civil Code. Also seeks that defendants be preliminarily and permanently enjoined from engaging in the unlawful, unfair and fraudulent acts and practices alleged.
5. ON WHOM PROCESS WAS SERVED: CT Corporation System, Los Angeles, California
6. DATE AND HOUR OF SERVICE: By Process server on 08/24/1998 at 09:40
7. APPEARANCE OR ANSWER DUE: Within 30 days
8. ATTORNEY(S): James C. Sturdevant
The Sturdevant Law Firm
(415) 477-2410
475 Sansome Street, Suite 1750
San Francisco, Ca 94111
9. REMARKS: Name discrepancy noted.

SIGNED CT Corporation System

PER Jere Keprios /RD
ADDRESS 818 West Seventh Street
Los Angeles, CA 90017
SOP WS 0001969210

Information contained on this transmittal form is recorded for CT Corporation System's record keeping purposes only and to permit quick reference for the recipient. This information does not constitute a legal opinion as to the nature of action, the amount of damages, the answer date, or any information that can be obtained from the documents themselves. The recipient is responsible for interpreting the documents and for taking the appropriate action.

BOFA MOFO 018474

SUMMONS (CITACION JUDICIAL)

1-11

NOTICE TO DEFENDANT: (Aviso a Acusado)

BANK OF AMERICA, N.T. & S.A., a California corporation, and DOES 1-50,

AUG 24 1998

**YOU ARE BEING SUED BY PLAINTIFF:
(A Ud. le está demandando)**

PAUL MILLER, individually and on behalf of others similarly situated,

You have **30 CALENDAR DAYS** after this summons is served on you to file a typewritten response at this court.

A letter or phone call will not protect you; your typewritten response must be in proper legal form if you want the court to hear your case.

If you do not file your response on time, you may lose the case, and your wages, money and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may call an attorney referral service or a legal aid office (listed in the phone book).

Después de que le entreguen esta citación judicial usted tiene un plazo de **30 DIAS CALENDARIOS** para presentar una respuesta escrita a máquina en esta corte.

Una carta o una llamada telefónica no le ofrecerá protección; su respuesta escrita a máquina tiene que cumplir con las formalidades legales apropiadas si usted quiere que la corte escuche su caso.

Si usted no presenta su respuesta a tiempo, puede perder el caso, y le pueden quitar su salario, su dinero y otras cosas de su propiedad sin aviso adicional por parte de la corte.

Existen otros requisitos legales. Puede que usted quiera llamar a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de referencia de abogados o a una oficina de ayuda legal (vea el directorio telefónico).

The name and address of the court is: (El nombre y dirección de la corte es)

ALAMEDA COUNTY SUPERIOR COURT
1225 Fallon Street
Oakland, CA 94612

CASE NUMBER: (Número del Caso)

801882-1

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es)

James C. Sturdevant (SBN 94551)
THE STURDEVANT LAW FIRM
475 Sansome Street, Suite 1750
San Francisco, CA 94111

(415) 477-2410

DATE:
(Fecha)

AUG 13 1998

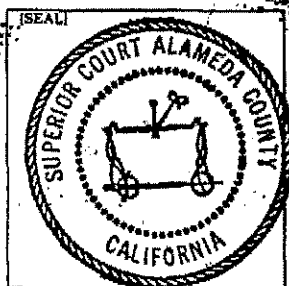
RONALD G. OVERHOLT-EXEC. OFF./CLERK

Clerk, by
(Actuario)

Shirley Buckett

Deputy
(Delegado)

(SEAL)



NOTICE TO THE PERSON SERVED: You are served

1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of (specify):
3. ☒ on behalf of (specify): BANK OF AMERICA, N.T. & S.A., a California corporation, and DOES 1-50
 under: ☒ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (individual)
☐ other:
4. ☐ by personal delivery on (date):

Form Adopted by Rule 882
Judicial Council of California
882(a)(9) (Rev. January 1, 1984)

(See reverse for Proof of Service)

SUMMONS

CCP 412.20

BOFA_MOFO_018475

1-12

PROOF OF SERVICE — SUMMONS
(Use separate proof of service for each person served)

1. I served the
- a. ☐ summons ☐ complaint ☐ amended summons ☐ amended complaint
☐ completed and blank Case Questionnaires ☐ Other (specify):
- b. on defendant (name):
- c. by serving ☐ defendant ☐ other (name and title or relationship to person served):
- d. ☐ by delivery ☐ at home ☐ at business
 (1) date:
 (2) time:
 (3) address:
- e. ☐ by mailing
 (1) date:
 (2) place:
2. Manner of service (check proper box):
- a. ☐ Personal service. By personally delivering copies. (CCP 415.10)
- b. ☐ Substituted service on corporation, unincorporated association (including partnership), or public entity. By leaving, during usual office hours, copies in the office of the person served with the person who apparently was in charge and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left. (CCP 415.20(a))
- c. ☐ Substituted service on natural person, minor, conservatee, or candidate. By leaving copies at the dwelling house, usual place of abode, or usual place of business of the person served in the presence of a competent member of the household or a person apparently in charge of the office or place of business, at least 18 years of age, who was informed of the general nature of the papers, and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left. (CCP 415.20(b)) (Attach separate declaration or affidavit stating acts relied on to establish reasonable diligence in first attempting personal service.)
- d. ☐ Mail and acknowledgment service. By mailing (by first-class mail or airmail, postage prepaid) copies to the person served, together with two copies of the form of notice and acknowledgment and a return envelope, postage prepaid, addressed to the sender. (CCP 415.30) (Attach completed acknowledgment of receipt.)
- e. ☐ Certified or registered mail service. By mailing to an address outside California (by first-class mail, postage prepaid, requiring a return receipt) copies to the person served. (CCP 415.40) (Attach signed return receipt or other evidence of actual delivery to the person served.)
- f. ☐ Other (specify code section):
☐ additional page is attached.
3. The "Notice to the Person Served" (on the summons) was completed as follows (CCP 412.30, 415.10, and 474):
- a. ☐ as an individual defendant.
- b. ☐ as the person sued under the fictitious name of (specify):
- c. ☐ on behalf of (specify):
 under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor) ☐ other:
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (individual)
- d. ☐ by personal delivery on (date):
4. At the time of service I was at least 18 years of age and not a party to this action.
5. Fee for service: \$
6. Person serving:
- a. ☐ California sheriff, marshal, or constable.
- b. ☐ Registered California process server.
- c. ☐ Employee or independent contractor of a registered California process server.
- d. ☐ Not a registered California process server.
- e. ☐ Exempt from registration under Bus. & Prof. Code 22350(b).
- f. Name, address and telephone number and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

(For California sheriff, marshal, or constable use only)
 I certify that the foregoing is true and correct.

Date:

Date:

(SIGNATURE)

(SIGNATURE)

982(a)(9) (Rev. January 1, 1984)

BOFA MOFO 018476

**ENDORSED
FILED
ALAMEDA COUNTY**

AUG 13 1998

RONALD G. OVERHOLT, CLERK, Ulf./Clerk
By Dorothy Duckett

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5 Attorneys for Plaintiff PAUL MILLER

6
7 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
8 **IN AND FOR THE COUNTY OF ALAMEDA**
9

10 PAUL MILLER, individually and on behalf
of others similarly situated,

11 Plaintiff,

12 vs.

13 BANK OF AMERICA N.T. & S.A.
14 a California corporation, and DOES 1 - 50,

15 Defendants.
16

CASE NO. **801882-1**

CLASS ACTION

COMPLAINT FOR FRAUD;
VIOLATION OF CODE OF CIVIL
PROCEDURE § 704.080;
VIOLATION OF CODE OF CIVIL
PROCEDURE § 1750 et seq.;
INTENTIONAL INFLECTION OF
EMOTIONAL DISTRESS;
VIOLATION OF BUSINESS AND
PROFESSIONS CODE § 17200 et
seq.; VIOLATION OF BUSINESS
AND PROFESSIONS CODE §
17500.

JURY TRIAL DEMANDED

Type of Case: Unfair Business
Practices

21
22 **INTRODUCTION**

23 Plaintiff PAUL MILLER, by his attorneys, brings this action on behalf of
24 himself and a class of similarly-situated persons to challenge defendant's unlawful
25 and unfair practice of debiting Social Security direct deposit accounts for amounts
26 protected from levy by law, and assessing unfair and unconscionable overdraft and
27 return item fees from Social Security Direct Deposit accounts. Plaintiff seeks
28 compensatory and punitive damages, restitution, declaratory and injunctive relief,

1

1 and attorneys' fees, costs and expenses.

2
3 **PARTIES**

4 1. Plaintiff PAUL MILLER ("MILLER") is an individual, residing at all
5 relevant times in the City and County of San Francisco, California. Plaintiff is a
6 consumer who has a Social Security Direct Deposit Account with defendant WELLS
7 FARGO BANK. At all times material herein, Plaintiff MILLER's Social Security
8 payments from the U.S. government were directly deposited into his account with
9 defendant BANK OF AMERICA once each month. Defendant BANK OF AMERICA
10 has repeatedly levied upon plaintiff MILLER's Social Security Direct Deposit account
11 for debts allegedly owed to BANK OF AMERICA by MILLER, although BANK OF
12 AMERICA erroneously credited MILLER's account with funds that it later attempted
13 to collect, and BANK OF AMERICA is prohibited by law from levying upon Social
14 Security Direct Deposit funds. BANK OF AMERICA has imposed service charges on
15 MILLER's account as a result of these improper levies and overdrafts resulting
16 therefrom.

17 2. At all material times, defendant BANK OF AMERICA N.T.S.A. ("BANK OF
18 AMERICA") was, and is, a California corporation, with its principal place of
19 business in San Francisco, California. BANK OF AMERICA is engaged in a
20 nationwide business of marketing and providing banking and other financial
21 services, including Social Security Direct Deposit Accounts. BANK OF AMERICA
22 has offices throughout California, including in Alameda County. BANK OF
23 AMERICA affirmatively solicits Social Security Direct Deposit customers residing in
24 the State of California, and provides services to and collects payments from such
25 customers.

26 3 Plaintiff is ignorant of the true names and capacities of defendants
27 sued herein as DOES 1-50, and therefore sues these defendants by such fictitious
28 names. Plaintiff will amend his complaint to state the true names and capacities

1 when ascertained. Plaintiff is informed and believes that each of the fictitiously
2 named defendants is responsible in some manner for the occurrences and damages
3 alleged herein, and that plaintiff's damages as hereinafter set forth were
4 proximately caused by said defendants.

5 4. Plaintiff is informed and believes and thereon alleges that each of the
6 defendants acted in concert with each and every other defendant, intended to and
7 did participate in the events, acts, practices and courses of conduct alleged herein,
8 and was a proximate cause of damage and injury thereby to plaintiff as alleged
9 herein.

10 5. At all times herein mentioned, each defendant was the agent or
11 employee of each of the other defendants and was acting within the course and
12 scope of such agency or employment.

13
14 **ALLEGATIONS COMMON TO ALL CAUSES OF ACTION**

15 6. In 1994, MILLER began receiving benefit payments from the Social
16 Security Administration in the form of Social Security Disability Income and
17 Supplemental Security Income (hereinafter collectively referred to as "SSI").
18 Individuals qualify for such benefit payments when they are permanently disabled
19 and are unable to remain gainfully employed as a result of an ongoing physical or
20 mental impairment. MILLER was physically assaulted in or around 1989 and
21 suffered brain damage as a result of the assault. MILLER's sole source of income is
22 his social security benefits, which he receives in the total amount of \$670.40 per
23 month. MILLER resides in a rent controlled apartment for which he pays
24 approximately \$530.00 per month in rent.

25 7. Plaintiff receives SSI benefits because of head injuries he received
26 during a violent assault in 1989, resulting in brain damage. As a result, he suffers
27 from recurrent depression, insomnia and other symptoms for which he takes
28 medication on a regular basis for which he is under the care of a physician, and

1 sees a psychiatric counselor on a regular basis.

2 8. In 1994, when he first began receiving SSI, MILLER established a
3 Social Security Direct Deposit account with BANK OF AMERICA. Through May 14,
4 1998, MILLER paid a monthly service charge of approximately \$2.50 to maintain
5 this account. Plaintiff elected to have his Social Security benefits directly deposited
6 into his account because of the safety, security and convenience of that procedure.
7 He believed that he would not have to wait to receive the check in the mail and
8 then go to the bank to deposit it. He also believed that the check would never get
9 lost or stolen as it could have been if delivered by regular mail.

10 9. BANK OF AMERICA knew at all times relevant herein that MILLER
11 received Social Security in the form of SSI payments.

12 10. On or about January 30, 1998, BANK OF AMERICA, through no fault
13 of MILLER, erroneously credited MILLER's account with an amount of \$1,799.83.
14 This erroneous credit or deposit was made on the same date on which MILLER's
15 regular monthly SSI payment was deposited. The erroneous deposit was assumed
16 by MILLER to be a retroactive lump sum payment from the Social Security
17 Administration for a possible underpayment during previous months.

18 11. Without prior notice on or about April 16, 1998, BANK OF AMERICA
19 reversed the \$1,799.83 entry in MILLER's account. Plaintiff did not read or see any
20 Debit Adjustment Notice concerning this transaction prior to May 3, 1998.

21 12. On or about May 1, 1998, Plaintiff's May Social Security benefits
22 totaling \$670.40 were deposited into the account. Unknown to Plaintiff, the
23 account then still had a negative balance because of the April levy by BANK OF
24 AMERICA.

25 13. On or about May 3, 1998, Plaintiff learned through BANK OF
26 AMERICA's automated telephone system that his account was overdrawn by an
27 amount in excess of \$1500.00. He immediately sought assistance from Bank of
28 America representatives. Plaintiff is informed and believes and thereon alleges that

1 BANK OF AMERICA personnel at his servicing branch told him that he needed to
2 find a source of funds to repay BANK OF AMERICA, and suggested that he apply
3 for a credit card.

4 14. On or about May 6, 1998, after an attorney had spoken with BANK OF
5 AMERICA's legal department on his behalf, Plaintiff was advised that BANK OF
6 AMERICA had agreed to release his May Social Security benefits. Plaintiff is
7 informed and believes and thereon alleges that he was told by personnel at his
8 servicing BANK OF AMERICA branch that a new account could be opened and his
9 Social Security benefits could be placed in the new account. A new VERSATEL
10 checking amount, Number 21987-02761, was opened and the \$670.40 Social
11 Security benefits for May that had been levied by BANK OF AMERICA earlier were
12 placed in the account. Plaintiff is informed and believes and thereon alleges that he
13 was told by BANK OF AMERICA personnel that money would not be taken from the
14 new account to pay the debt on the old account.

15 15. Despite BANK OF AMERICA's promises, in June, 1998, BANK OF
16 AMERICA levied upon Plaintiff's new account to satisfy its own claim against him.
17 Once again, after an attorney intervened, the funds were returned to Plaintiff's
18 account. Plaintiff was caused considerable inconvenience and hardship, as well as
19 financial difficulties, because of defendant's actions.

20 16. For a third consecutive month, in July, 1998, BANK OF AMERICA levied
21 upon Plaintiff's new account to pay the debt on the old account. After an attorney
22 again intervened, the funds were returned to the new account. Plaintiff's rent
23 check was returned unpaid for lack of funds. Had had BANK OF AMERICA not
24 continued its unlawful levies upon Plaintiff's Social Security Direct Deposit funds,
25 there would have been sufficient funds in the account to cover the rent check.
26 After the intervention of an attorney, the rent check was paid. Plaintiff is informed
27 and believes and thereon alleges that he was told by BANK OF AMERICA personnel
28 that his Social Security funds would probably continue to be seized by the bank's

1 collection system without notice in future months, so long as the debt remained
2 unpaid.

3 17. Pursuant to Title 31, United States Code, section 3332, since 1995
4 Federal wage, salary, and retirement payments have been paid to authorized
5 recipients by direct deposit electronic funds transfer, with certain exceptions.
6 Effective January 1, 1999, all Federal payments shall be made by direct deposit
7 electronic funds transfer, unless waiver is granted by the Secretary of the Treasury.
8 Electronic funds transfer direct deposits thus have become, and will continue to be,
9 a lucrative source of income for banks and other financial institutions, including
10 without limitation BANK OF AMERICA, because of the large number of recipients of
11 Federal wages, salaries, retirement benefits and other benefits and payments.
12 Plaintiff is informed and believes and thereon alleges that this revenue stream is a
13 significant incentive to BANK OF AMERICA to keep direct deposit accounts open
14 despite overdraft and return activity that would otherwise warrant closing the
15 accounts and to continue to levy charges upon the accounts for unpaid debts.
16 BANK OF AMERICA has the power to close accounts without notice if, in the
17 discretion of BANK OF AMERICA, overdraft and return activity or outstanding
18 obligations warrant such action.

19 18. Plaintiff is informed and believes and thereon alleges that BANK OF
20 AMERICA has established thousands of direct deposit accounts for recipients
21 Government benefits, including but not limited to Social Security benefits. BANK
22 OF AMERICA charges and collects substantial service fees for each of these
23 accounts.

24 19. Plaintiff is informed and believes and thereon alleges that many of the
25 recipients of Government benefits who have direct deposit accounts with BANK OF
26 AMERICA for such benefits are Senior citizens, as defined by California Civil Code §
27 1761 (f) and California Business and Professions Code § 17206.1 (b) (1) and/or
28 disabled persons, as defined by California Civil Code § 1761 (g) and California

1 Business and Professions Code § 17206 (b) (2). Plaintiff is further informed and
2 believes and thereon alleges that BANK OF AMERICA, through advertising,
3 brochures and other promotional materials, has represented to its direct deposit
4 customers and applicants for such accounts that its direct deposit accounts are
5 safe and secure and that direct deposit is the safest and most reliable way to
6 deposit pension or annuity checks, among others. Plaintiff is further informed and
7 believes and thereon alleges that many of the BANK OF AMERICA customers who
8 own, maintain and use Government benefit direct deposit accounts are unable,
9 through age, infirmity and/or lack of understanding are unable fully to comprehend
10 the nature and extent of charges, including but not limited to substantial recurring
11 and escalating overdraft and return charges, and unauthorized levies, and other
12 adverse consequences that could be and/or have been imposed upon direct deposit
13 account holders by BANK OF AMERICA.

14 20. As a result of the practices described above, plaintiff PAUL MILLER and
15 other BANK OF AMERICA customers have been damaged in that BANK OF
16 AMERICA has knowingly and willfully debited their Government benefit direct
17 deposit accounts for levies that are unconscionable and contrary to statute and
18 therefore unlawful, and have further been damaged in that they have been deprived
19 of access to the funds in their accounts and thus have been unable to purchase the
20 goods and services for which Government benefits are provided.

21
22 **CLASS ACTION ALLEGATIONS**

23 21. Pursuant to California Code of Civil Procedure § 382 and California
24 Civil Code § 1781, plaintiff brings this action on behalf of himself and all other
25 persons similarly situated. The class that plaintiff represents (hereinafter the
26 "Plaintiff Class") is composed of all California residents who have or have had a
27 BANK OF AMERICA Government benefits direct deposit account at any time within
28 four years preceding the filing of this lawsuit. A subclass of the Plaintiff Class

1 (hereinafter the "Subclass") is composed of all members of the Plaintiff Class who
2 are Senior citizens as defined by California Civil Code § 1761 (f) and California
3 Business and Professions Code § 17206.1 (b) (1) and/or disabled persons as
4 defined by California Civil Code § 1761 (g) and California Business and Professions
5 Code § 17206 (b) (2). Plaintiff and the Plaintiff Class, including the subclass, are
6 hereinafter referred to jointly as "plaintiffs."

7 22. Plaintiffs are unable to state the precise number of potential members
8 of the Plaintiff Class because that information is in the possession of defendant
9 BANK OF AMERICA. Plaintiffs are informed and believe and thereon allege that the
10 Plaintiff Class numbers at least in the tens of thousands and is so numerous that
11 joinder of all members would be impracticable. The exact size of the Plaintiff Class,
12 and the subclass, and the identity of the members thereof, would be readily
13 ascertainable from the business records of BANK OF AMERICA.

14 23. Questions of law and fact common to the Plaintiff Class exist that
15 predominate over questions affecting only individual members, including, *inter alia*,
16 the following:

17 a. Whether BANK OF AMERICA has knowingly and willfully, and/or
18 negligently, deducted from the Government benefit accounts of the Plaintiff Class
19 charges that are unconscionable and therefore unlawful;

20 b. Whether the actions of BANK OF AMERICA as hereinabove
21 described violated California Code of Civil Procedure § 704.080;

22 c. Whether the actions of BANK OF AMERICA as hereinabove
23 described violated the Consumer Legal Remedies Act, California Civil Code § 1750
24 et seq.

25 d. Whether the actions of BANK OF AMERICA as hereinabove
26 described were fraudulent;

27 e. Whether plaintiff and the other members of the Plaintiff Class were
28 injured in their business or property by reason of the unlawful, unfair and/or

1 fraudulent conduct of BANK OF AMERICA and the class-wide measure of damages;
 2 f. Whether plaintiff and the other members of the Plaintiff Class are
 3 entitled to injunctive relief and restitution.

4 24. The claims asserted by plaintiff MILLER in this action are typical of
 5 the claims of the members of the Plaintiff Class as described above, the claims
 6 arise from the same course of conduct by BANK OF AMERICA, and the relief
 7 sought is common.

8 25. Plaintiff MILLER will fairly and adequately represent and protect the
 9 interests of the members of the Plaintiff Class. Plaintiffs have retained counsel
 10 competent and experienced in both consumer protection and class action litigation.

11 26. A class action is superior to other methods for the fair and efficient
 12 adjudication of this controversy, since joinder of all members is impracticable.
 13 Furthermore, because the economic damages suffered by the individual class
 14 members may be relatively modest, albeit significant, compared to the expense and
 15 burden of individual litigation, it would be impracticable for most Plaintiff Class
 16 members to seek redress individually for the wrongful conduct alleged herein.
 17 There will be no real difficulty in the management of this litigation as a class action.

18
 19 **FIRST CAUSE OF ACTION FOR DAMAGES AND PUNITIVE DAMAGES**
 20 **(Violation of California Civil Code §§ 1709, 1710 (Fraud) Asserted on Behalf of**
 21 **Plaintiff and the Plaintiff Class)**

22 27. Plaintiffs reallege and incorporate herein by reference the allegations
 23 set forth in paragraphs 1 through 26 above as if fully alleged herein.

24 28. At all times herein mentioned, defendant BANK OF AMERICA was in
 25 the business of providing banking services, including but not limited to bank deposit
 26 accounts, to the general public. Among the accounts provided were accounts into
 27 which direct deposits of Government benefits could be and were made.

28 29. At all times herein mentioned, BANK OF AMERICA represented to the

1 public through brochures, advertisements, and other means that their direct deposit
2 accounts were safe and secure. BANK OF AMERICA further represented to the
3 public that direct deposit is the safest, most reliable way to deposit annuity,
4 pension or retirement checks, including but not limited to Social Security benefits
5 and Veterans' benefits.

6 30. BANK OF AMERICA's representations concerning safety and security
7 were untrue in that at all times material herein BANK OF AMERICA imposed
8 unexpected and unlawful levies, in violation of Californian Code of Civil Procedure §
9 704.080 upon its direct deposit account holders, rendering the direct deposit
10 accounts unsafe and insecure.

11 31. BANK OF AMERICA made the representations herein alleged with the
12 intention of inducing the public, including but not limited to plaintiffs, to purchase,
13 maintain, and use BANK OF AMERICA's direct deposit accounts.

14 32. Plaintiffs were aware of BANK OF AMERICA's representations herein
15 alleged and relied on them in purchasing and maintaining their direct deposit
16 Government benefit accounts with BANK OF AMERICA.

17 33. At the time BANK OF AMERICA made the representations herein
18 alleged, BANK OF AMERICA knew that the representations were false.

19 34. BANK OF AMERICA made the representations herein alleged with the
20 intention of depriving plaintiffs of property or legal rights, to wit: the use of some
21 or all of their direct deposit Government benefits, or otherwise causing injury, and
22 was guilty of fraud.

23 35. As a proximate result of BANK OF AMERICA's intentional
24 misrepresentations, plaintiffs were damaged by suffering the loss of some of their
25 Government benefits and by being unable to acquire, possess, and use the goods
26 and services ordinarily paid for by their Government benefits, in an amount to be
27 proved at trial.

28 36. The wrongful conduct of BANK OF AMERICA, as herein alleged, was

1 intentional and was done with malicious, oppressive or fraudulent intent. Plaintiffs
2 are therefore entitled to recover punitive damages.

3
4 **SECOND CAUSE OF ACTION FOR DAMAGES**

5 (Violation of California Civil Code §§ 1709, 1710 (Negligent Misrepresentation)

6 Asserted on Behalf of Plaintiff and the Plaintiff Class)

7 37. Plaintiffs reallege and incorporate herein by reference the allegations
8 set forth in paragraphs 1 through 32 above as if fully alleged herein.

9 38. At the time BANK OF AMERICA made the misrepresentations herein
10 alleged, BANK OF AMERICA had no reasonable grounds for believing the
11 representations to be true.

12 39. As a proximate result of BANK OF AMERICA's negligent
13 misrepresentations, plaintiffs were damaged by suffering the loss of some of their
14 Government benefits and by being unable to acquire, possess, and use the goods
15 and services ordinarily paid for by their Government benefits, in an amount to be
16 proved at trial.

17
18 **THIRD CAUSE OF ACTION FOR DAMAGES AND PUNITIVE DAMAGES**

19 (Violation of Code of Civil Procedure §704.080;

20 Asserted on behalf of Plaintiff and the Plaintiff Class)

21 40. Plaintiffs reallege and incorporate herein by reference the allegations
22 set forth in paragraphs 1 through 39 above as if fully alleged herein.

23 41. California Code of Civil Procedure § 704.080 provides that Social
24 Security payments that are directly deposited by the U.S. government into a bank
25 account are exempt from levy, regardless of the amount of the deposit. The statute
26 further establishes that Social Security Direct Deposit accounts are exempt from
27 levy, without the consumer having to make a claim of exemption, for amounts up
28 to \$2,000 for a single depositor account and for amounts up to \$3,000 for an

1 account with two or more depositors.

2 42. California Code of Civil Procedure § 704.080(d) also specifically
3 requires a financial institution that holds a Social Security Direct Deposit account to
4 follow certain procedures when processing a levy such that no exempt funds are
5 seized.

6 43. Defendant BANK OF AMERICA has engaged and is continuing to
7 engage in a business practice of unlawfully debiting accounts of Social Security
8 Direct Deposit account holders for amounts sought through levy by alleged
9 creditors including, without limitation, defendant BANK OF AMERICA and assessing
10 service fees for the processing of such levies. Such practices violate California
11 Code of Civil Procedure § 704.080 in that Social Security Direct Deposit funds are
12 exempt from levy.

13 44. Defendants' violation of Code of Civil Procedure § 704.080
14 constitutes a tort in that it is a breach of a non-consensual duty owed to another.
15 Code of Civil Procedure § 704.080 was enacted for the protection of plaintiffs and
16 embodies a public policy that Social Security Direct Deposit accounts shall not be
17 subject to levy. Accordingly, defendant's violation of said statute constitutes a tort
18 and defendants are therefore liable for all damages suffered by plaintiffs.

19 45. As a result of defendants' unlawful practice, plaintiffs were denied
20 funds to which they are statutorily entitled and were charged improper service fees,
21 and have suffered substantial damages, including without limitation, monetary
22 losses.

23 46. Defendants have engaged in the aforementioned conduct willfully and
24 for the specific purpose of denying plaintiffs rightful access to the funds in their
25 accounts and collecting substantial bank service fees. Defendants have thus acted
26 with oppression and malice in that they have deliberately engaged in conduct that
27 has subjected plaintiffs and members of the plaintiff class to cruel and unjust
28 hardship in conscious disregard of such individual's statutory rights; and have

1 carried out such conduct with a willful and conscious disregard of the rights of
2 plaintiffs. Accordingly, plaintiffs are entitled to an award of punitive damages
3 according to proof at the time of trial.

4
5 **FOURTH CAUSE OF ACTION FOR INJUNCTIVE RELIEF**

6 (Violation of the Consumer Legal Remedies Act, California Civil Code § 1750, et
7 seq., Asserted on Behalf of Plaintiff and the Plaintiff Class)

8 47. Plaintiffs reallege and incorporate herein by reference the allegations
9 set forth in paragraphs 1 through 46 above as if fully alleged herein.

10 48. The Consumer Legal Remedies Act, California Civil Code § 1750, et
11 seq. (hereinafter "the CLRA"), was designed to protect consumers from unfair and
12 deceptive business practices. To this end, the CLRA sets forth a list of unfair and
13 deceptive acts and practices that are specifically prohibited in any transaction
14 intended to result in the sale or lease of goods or services to a consumer. Cal. Civil
15 Code § 1770. Defendant BANK OF AMERICA's acts and practices, as hereinabove
16 described, violate the following provisions of the CLRA, without limitation:

17 a. § 1770 (a) (5) in that BANK OF AMERICA represented that the
18 services (direct deposit accounts) have characteristics, uses, benefits or quantities
19 which they do not have, to wit: safety and security;

20 b. § 1770 (a) (7) in that BANK OF AMERICA represented that the
21 services (direct deposit accounts) are of a particular standard and quality of safety
22 and security that the accounts did not possess;

23 c. § 1770 (a) (13) in that BANK OF AMERICA made false and
24 misleading statements concerning the safety and security of its direct deposit
25 accounts;

26 d. § 1770 (a) (14) in that BANK OF AMERICA represented that the
27 banking transactions arising out of its direct deposit accounts conferred rights and
28 remedies which they did not have or which are prohibited by law;

1 e. § 1770 (a) (19) in that BANK OF AMERICA inserted unconscionable
2 provisions in the contract for the provision of direct deposit accounts for
3 Government benefits concerning assessment and collection of fees for overdrafts
4 and return items.

5 49. As a result of the unfair and deceptive acts and practices of BANK OF
6 AMERICA hereinabove described, plaintiff PAUL MILLER and members of the
7 Plaintiff Class have suffered substantial economic losses in an amount to be proven
8 at trial.

9 50. Pursuant to California Civil Code §§ 1780 and 1781, plaintiff and the
10 Plaintiff Class hereby request certification of the Plaintiff Class, injunctive relief,
11 restitution and attorneys' fees, costs and expenses pursuant to California Civil Code
12 § 1780 (d) and California Code of Civil Procedure § 1021.5.

13 **FIFTH CAUSE OF ACTION FOR DAMAGE AND PUNITIVE DAMAGES**

14 (Intentional Infliction of Emotional Distress;

15 Asserted on Behalf of Plaintiff)

16 51. Plaintiff realleges and incorporates herein by reference the allegations set
17 forth in paragraphs 1 through 20 and 27 through 50 as if fully alleged herein.

18 52. Defendants knew at all relevant times that debiting a Social Security
19 Direct Deposit account pursuant to a levy and collecting substantial bank service fees
20 for processing such levy, were contrary to the law and policy of the State of
21 California, and in violation of the statutory rights of the plaintiff. Defendants further
22 knew that plaintiff had limited income and that such acts would cause him
23 considerable hardship and emotional distress. Nevertheless, defendants committed
24 such acts deliberately and repeatedly, and with conscious disregard for the rights of
25 the plaintiff.

26 53. As a result of defendants' acts as hereinabove described, plaintiff MILLER
27 has suffered severe emotional distress, including without limitation, anger, stress,
28 worry, anxiety, humiliation, fear, depression, fatigue and frustration.

1 54. Defendants committed the above-described wrongful and intentional acts
 2 because they felt confident in their position of wealth, sophistication and power, and
 3 in their ability to manipulate plaintiff and to coerce him into relinquishing rights
 4 guaranteed to them by law. Defendants deliberately, willfully and maliciously pursued
 5 this course of conduct because they had no fear that the plaintiff would understand
 6 the nature of the transactions and/or be able to assert his legal rights. Defendants
 7 have thus acted with oppression and malice in that they have engaged in despicable
 8 conduct, intended to cause cruel and unjust hardship to plaintiff, and have carried out
 9 such conduct with a willful and conscious disregard of the rights of plaintiff.
 10 Accordingly, plaintiff seeks and is entitled to awards of compensatory and punitive
 11 damages according to proof at the time of trial.

12
 13 **SIXTH CAUSE OF ACTION FOR RESTITUTION AND INJUNCTIVE RELIEF**

14 (Violation of California Business and Professions Code § 17200, *et seq.*,

15 Asserted on Behalf of Plaintiffs and All Affected Members of the General Public)

16 55. Plaintiffs reallege and incorporate herein by reference the allegations
 17 set forth in paragraphs 1 through 20 and 27 through 50 above as if fully alleged
 18 herein.

19 56. Plaintiffs bring this cause of action acting as a private attorney general
 20 on behalf of the public challenge defendant's business practices. California
 21 Business and Professions Code § 17200, The Unfair Competition Law ("UCL"),
 22 defines unfair competition to include any unlawful, unfair or fraudulent business act
 23 or practice. The UCL provides that a Court may order injunctive relief and
 24 restitution to affected members of the general public as remedies for any violation
 25 of the Act.

26 57. The business acts and practices of defendant BANK OF AMERICA, as
 27 hereinabove and hereinafter described, constitute an unlawful business practice in
 28 violation of the UCL for the reasons set forth below, without limitation:

1 a. The acts and practices violate California Civil Code §§ 1709 and
2 1710 for the reasons set forth in the First and Second Causes of Action, and are
3 therefore unlawful;

4 b. The acts and practices violate California Civil Code § 1750, et
5 seq., for the reasons set forth in the Fourth Cause of Action and are therefore
6 unlawful.

7 c. The acts and practices constitute violate California Business and
8 Professions Code § 17500 for the reasons set forth in the Seventh Cause of Action
9 and are therefore unlawful.

10 58. The business acts and practices of defendant BANK OF AMERICA as
11 hereinabove described also constitute an unfair business practice in violation of the
12 UCL in that such acts and practices are substantially injurious to consumers and
13 offensive to established California public policy.

14 59. In addition, the business acts and practices of defendant BANK OF
15 AMERICA as hereinabove described constitute a fraudulent business practice in
16 violation of the UCL in that such acts and practices are likely to deceive California
17 consumers as to their legal rights and obligations with respect to protection from
18 levies on their Government benefit direct deposit accounts and protection from the
19 consequences of excessive overdrafts.

20 60. Pursuant to California Business and Professions Code §17203
21 plaintiffs seek to enjoin these acts and practices and to obtain restitution of all
22 funds seized from plaintiffs by reason of and through the use of such unlawful,
23 unfair and fraudulent acts and practices. Pursuant to California Business and
24 Professions Code §17203, plaintiff, individually, and on behalf of all members of
25 the general public who are, have been or may be, subjected to these unlawful,
26 unfair, and fraudulent business acts and practices of defendants, hereby requests
27 preliminary and permanent injunctive relief prohibiting such practices in the future,
28 and such other orders as may be necessary to restore to any person in interest, any

1 money or property, real or personal, which may have been seized from plaintiffs by
 2 means of such unlawful, unfair and fraudulent business practices, and to disgorge
 3 all profits defendants have earned thereby. In addition, pursuant to California Code
 4 of Civil Procedure § 1021.5, plaintiffs are entitled to recover their reasonable
 5 attorney's fees, costs and expenses incurred in bringing this action.

6
 7 **SEVENTH CAUSE OF ACTION FOR RESTITUTION AND INJUNCTIVE RELIEF**

8 (Violation of California Business and Professions Code § 17500, et seq.;

9 Asserted on Behalf of Plaintiffs and All Affected Members of the General Public)

10 61. Plaintiffs reallege and incorporate herein by reference the allegations
 11 set forth in paragraphs 1 through 20, 27 through 50 and 56 through 60 above as if
 12 fully alleged herein.

13 62. Plaintiff brings this Cause of Action acting as a private attorney
 14 general on behalf of the public to challenge defendant's advertising practices.
 15 California Business and Professions Code § 17500, prohibits untrue or misleading
 16 advertising. A Court may order injunctive relief and restitution to affected members
 17 of the general public as remedies for any violations of Business and Professions
 18 Code § 17500 as part of the UCL.

19 63. At all times material herein defendant BANK OF AMERICA has
 20 engaged in advertising to the public, including plaintiffs, and offering to the public
 21 bank accounts that include a direct deposit feature ("direct deposit accounts.") The
 22 advertisements include, without limitation, brochures stating, " Bank of America's
 23 Direct Deposit is a safe and convenient means to deposit your money, no matter
 24 where you are. No more trips to the bank on payday to deposit regular monthly
 25 payments such as salary, pension, Social Security or Supplemental Security Income
 26 (SSI) checks. With direct deposit, your funds are electronically deposited into your
 27 designated bank and are instantly available," or words to that effect. The
 28 advertisements were disseminated to and received by the public in California.

1 64. Defendant BANK OF AMERICA engaged in the advertising herein
2 alleged with the intent to induce the public to open, maintain and use BANK OF
3 AMERICA direct deposit accounts for their Government benefits.

4 65. Defendant BANK OF AMERICA's advertising was untrue or
5 misleading and likely to deceive the public in that while BANK OF AMERICA stated
6 and implied that direct deposit accounts were safe and secure, the aforesaid
7 accounts were subject to excessive, escalating, recurring and unconscionable
8 levies, overdraft and return charges, rendering the direct deposit accounts unsafe
9 and insecure. BANK OF AMERICA continued to keep open and collect fees from
10 direct deposit accounts with excessive overdraft activity, thereby depriving the
11 owners of those accounts of Government benefits of access to some or all of the
12 funds in their accounts, thus impairing their ability to purchase the goods and
13 services for which the Government benefits were provided.

14 66. In making and disseminating the statements herein alleged, BANK OF
15 AMERICA knew, or by the exercise of reasonable care should have known, that the
16 statements were and are untrue or misleading and so acted in violation of California
17 Business and Professions Code § 17500.

18 67. The business acts and practices of defendant BANK OF AMERICA as
19 hereinabove described also constitute an unfair business practice in violation of the
20 UCL in that such acts and practices are substantially injurious to consumers and
21 offensive to established California public policy.

22 68. In addition, the business acts and practices of defendant BANK OF
23 AMERICA as hereinabove described constitute a fraudulent business practice in
24 violation of the UCL in that such acts and practices are likely to deceive California
25 consumers as to their legal rights and obligations with respect to the safety and
26 security of their Government benefit direct deposit accounts and protection from
27 levies by BANK OF AMERICA and from the consequences of excessive overdrafts.

28 69. Pursuant to California Business and Professions Code §17535

1 plaintiffs seek to enjoin these acts and practices and to obtain restitution of all
2 funds seized from plaintiffs by reason of and through the use of such false
3 advertising. Pursuant to California Business and Professions Code §1.7535, plaintiff,
4 individually, and on behalf of all members of the general public who are, have been
5 or may be, subjected to these unlawful, unfair, and fraudulent business acts and
6 practices of defendants, hereby requests preliminary and permanent injunctive relief
7 prohibiting such practices in the future, and such other orders as may be necessary
8 to restore to any person in interest, any money or property, real or personal, which
9 may have been seized from plaintiffs by means of such false advertising, and to
10 disgorge all profits defendants have earned thereby. In addition, pursuant to
11 California Code of Civil Procedure § 1021.5, plaintiffs are entitled to recover their
12 reasonable attorney's fees, costs and expenses incurred in bringing this action.

13
14 **PRAYER FOR RELIEF**

15 WHEREFORE, plaintiffs respectfully pray as follows:

- 16 I. That this Court certify this case as a class action;
17 ii. That this Court find and declare the defendants' acts and practices as
18 described herein to be unlawful, unfair and fraudulent;
19 iii. That plaintiffs and the Plaintiff Class be awarded compensatory damages
20 according to proof at trial;
21 iv. That plaintiffs and the Plaintiff Class be awarded punitive damages
22 according to proof at trial;
23 v. That the Subclass be awarded treble damages pursuant to California Civil
24 Code § 3345;
25 vi. That defendants be preliminarily and permanently enjoined from
26 engaging in the unlawful, unfair and fraudulent acts and practices alleged herein;
27 vii. That defendants be ordered to make restitution to all affected members
28 of the general public;

1 viii. That plaintiffs be awarded attorneys' fees and expenses pursuant to
2 California Code of Civil Procedure §1021.5 and California Civil Code § 1780;

3 ix. That plaintiffs and the Plaintiff Class be awarded pre-judgment interest
4 on all sums collected;

5 x For costs of suit herein incurred; and

6 xi. For such other and further relief as the Court may deem proper.
7

8 DATED: August 13, 1998

Respectfully submitted,

9
10 THE STURDEVANT LAW FIRM

11 A Professional Corporation

12
13 By: 

14 JAMES C. STURDEVANT

15 Attorneys for Plaintiff
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EXHIBIT

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FILED
San Francisco County Superior Court

MAR 4 - 2005

IN THE SUPERIOR COURT
CITY AND COUNTY OF SAN FRANCISCO
STATE OF CALIFORNIA

GORDON PARK-LI, Clerk

BY: D. Lemire Deputy ClerkPAUL MILLER, individually and on behalf of
others similarly situated,

CASE NO. CGC-99-301917

Plaintiffs,

JUDGMENT

vs.

THE ANNEXED INSTRUMENT IS A
CORRECT COPY OF THE ORIGINAL
ON FILE IN MY OFFICE
ATTEST: CERTIFIED

MAR 4 - 2005

GORDON PARK-LI, Clerk
San Francisco County Superior CourtBY: Danial Lemire DEPUTY CLERKBANK OF AMERICA N.T. & S.A.
a California corporation, and DOES 1 - 50,

Defendants.

This action came on regularly for jury trial on January 20, 2004 in Department 624 of the Superior Court, the Hon. Anne Bouliane, Judge assigned to the case for all purposes, presiding. The plaintiff Paul Miller and the certified plaintiff class of similarly situated persons appeared through their counsel Thomas J. Brandi of the Brandi Law Firm and James C. Sturdevant and Mark T. Johnson of the Sturdevant Law Firm. Defendant Bank of America, N.A., originally sued as Bank of America, N.T. & S.A., was represented by Joseph S. Genshlea of Weintraub Genshlea Chediak Sproul and by Arne D. Wagner, Arturo J. Gonzalez and Heather A. Moser of Morrison & Foerster LLP.

On January 30, 2004 a jury of 12 persons and 4 alternates was regularly impaneled and sworn to receive evidence and render a verdict on plaintiffs' causes of action for intentional and negligent misrepresentation and for violations of the Consumer Legal Remedies Act, Civil Code sections 1770(a)(5) and 1770(a)(14). The court, sitting without a jury, received additional

1 evidence on plaintiffs' claims under Civil Code section 1770(a)(19), the Unfair Competition Law,
2 Business and Professions Code section 17200, *et seq.* and the False Advertising Act, Bus. & Prof.
3 Code § 17500, *et. seq.*

4 Witnesses were sworn and testified. After considering the evidence and the arguments of
5 counsel related to the issues before the jury, the jury was duly instructed by the Court and the cause
6 was submitted to the jury with directions to return a verdict on special issues. The jury deliberated
7 and thereafter returned to court with its special verdict, a copy of which is attached hereto as
8 Exhibit 1 and made a part hereof.

9 The jury awarded damages to the class in the amount of \$75,077,836.00 for amounts
10 collected by the defendant in the form of NSF fees set off or assessed against class member
11 accounts in violation of the law. In addition, having made the necessary findings, the jury
12 determined that an additional statutory damage award for members of the class under Civil Code
13 section 1780(b) was appropriate and awarded such damages in the amount of \$1,000.00 for each
14 class member who suffered substantial economic or emotional damage as a result of the
15 defendant's conduct. The jury also awarded additional individual damages for emotional distress to
16 plaintiff Paul Miller in the amount of \$275,000.00.

17 Based upon its consideration of all of the testimony and evidence before it, and the
18 arguments of counsel, the Court issued its Tentative Statement of Decision on the non-jury issues
19 on October 13, 2004. Thereafter, the parties submitted objections and proposed changes to the
20 Tentative Statement of Decision, together with additional materials and evidentiary submissions,
21 and presented oral argument to the Court in support of their objections at a hearing on December 8,
22 2004. After considering the parties' written objections and the argument in support of those
23 objections, the Court issued its final Statement of Decision on December 30, 2004. A copy of the
24 Court's Statement of Decision is attached hereto as Exhibit 2 and made a part hereof.

25 The Court has determined, and continues to find, that all of the conditions for treatment of
26 this case as a class action pursuant to Code of Civil Procedure §382 and Civil Code §1781 have
27
28

1 existed and continue to exist. The class was certified by the Court on October 16, 2001 and
2 includes the following persons:

3 All California residents who have, have had, or will have, at any time
4 after August 13, 1994, a checking or savings deposit account with
5 Bank of America into which payments of Social Security benefits or
6 other public benefits are or have been directly deposited by the
7 government or its agent.



8 Notice was given to the class during May and June, 2002 by means of an insert included
9 with the bank statements mailed to Bank of America customers having California checking or
10 savings accounts at that time. Following issuance of the notice and within the period permitted by
11 the Court for opting out of the class, 3,314 persons exercised their right to exclude themselves from
12 the class. A list of those persons is attached hereto as Exhibit 3 and is made a part hereof. All
13 other persons satisfying the definition of the class above are members of the class to whom this
14 judgment applies.

15 On February 19, 2004, at the close of the trial and approximately two years and four months
16 after issuance of the initial order certifying the class, Bank of America moved for decertification of
17 the class on the grounds that class treatment of the claims were inappropriate, that the class was
18 impermissibly broad and that plaintiff Paul Miller was not an adequate class representative. On
19 August 4, 2004, this Court, having considered the written memoranda in support of and in
20 opposition to the motion, and having heard oral argument from the parties on several dates, denied
21 the Bank's motion to decertify the class, finding that all of the criteria and conditions for class
22 certification were satisfied.

23 Plaintiff Paul Miller and the certified plaintiff class are entitled to judgment against
24 defendant Bank of America, N.A., originally sued as Bank of America N.T.S.A. ("the Bank"), in
25 the amount of \$284,385,741.00, collected through December 31, 2003, plus an additional \$1,000.00
26 per class member for each class member whose account was set off or assessed an NSF fee in
27

1 violation of law, and that plaintiff Paul Miller is entitled to judgment against the bank in the
 2 additional sum of \$275,000.00 in emotional distress damages awarded by the jury.

3 **NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED AS**
 4 **FOLLOWS:**

5 (1) Definitions:

- 6 (A) As used throughout this Judgment, "NSF (non-sufficient funds) fee(s)"
 7 means those fees which the Bank of America charges customers when a
 8 debit is posted to the account and there are insufficient funds in the account
 9 to cover the amount of the debit.
- 10 (B) As used herein, "Social Security benefits" means payments authorized by the
 11 Social Security Administration for regular retirement and survivors' benefits,
 12 supplemental security income benefits, coal miners' health benefits, and
 13 disability insurance benefits.
- 14 (C) As used herein, "public benefits" means aid payments authorized pursuant to
 15 subdivision (a) of section 11450 of the Welfare and Institutions Code,
 16 payments for supportive services as described in Section 11323.2 of the
 17 Welfare and Institutions Code, and general assistance payments made
 18 pursuant to Section 17000.5 of the Welfare and Institutions Code.

- 19 (2) Plaintiff and class members shall have judgment against and recover from defendant Bank
 20 of America the sum of \$295,650,220 (representing \$284,385,741.00 in NSF fees
 21 unlawfully collected through December 31, 2003, interest at the legal rate of ten
 22 percent (10%) per annum on \$75,077,836.00 of that sum from the date of the
 23 verdict, February 25, 2004, to the date of entry of judgment, and interest at the legal
 24 rate of 10% per annum on the balance of \$209,307,905 from the date of the Court's
 25 Statement of Decision, December 30, 2004 to the date of entry of judgment), plus
 26 interest at the legal rate of 10% per annum on this total from the date of the entry of
 27



1 this judgment until paid. Any unpaid residue after reasonable efforts at payment are
2 made to the Court's satisfaction shall be paid pursuant to California Code of Civil
3 Procedure §384.

4 (3) Plaintiff and class members shall have judgment against and recover from
5 defendant Bank of America the additional amount of \$1,000.00 per class
6 member whose account was assessed an NSF fee in violation of law, with
7 interest thereon at the rate of ten percent (10%) per annum from the date of
8 the entry of the verdict, February 25, 2004, until paid.

9 (4) Plaintiff Paul Miller shall have judgment against and recover from defendant
10 Bank of America the additional sum of \$275,000.00 for emotional distress
11 damages, with interest thereon at the rate of ten percent (10%) per annum
12 from the date of the entry of the verdict, February 25, 2004, until paid.

13 (5) Bank of America shall be and is permanently enjoined as follows:

14 (a) Bank of America shall cease and refrain from making any representation or
15 statement to California customers or potential customers, in writing or orally
16 through its employees or representatives, that it has the right to set off or take
17 NSF fees or other non-bank-fee money claims it has against customers from
18 directly deposited Social Security benefits and other public benefits in
19 customer deposit accounts in California.

20 (b) Bank of America shall cease and refrain from taking any directly deposited
21 Social Security benefits or other public benefits from customer accounts in
22 California to satisfy NSF fees and other monetary claims it has against
23 customers.

24 (6) Bank of America shall identify, locate and repay each class member from whom it
25 seized exempt Social Security benefits to pay itself NSF fees the full amount of
26 those fees, plus interest at the rate of 10% per annum, and make a full report to the
27
28



1 Court on its efforts quarterly beginning thirty (30) days following the entry of this
2 judgment.

- 3 (7) Bank of America shall identify, locate and repay each class member from whom it
4 seized exempt Social Security benefits to pay itself NSF fees the additional statutory
5 damages of \$1,000.00, plus interest, and make a full report to the Court on its efforts
6 to do so quarterly beginning thirty (30) days following the entry of this judgment.
7 (8) Pursuant to Civil Code §1781(g), Bank of America is ordered to prepare and give
8 notice of this judgment, in the same manner as the original notice, to each class
9 member who was previously served with notice of this action. Bank of America is
10 further ordered to provide such notice in the same manner to those class members
11 who did not have Bank of America checking or savings accounts at the time of the
12 original notice but now have such. The notice described herein shall be given on or
13 before the date which is 30 days from the date of entry of this judgment. The cost of
14 notice is to be borne by Bank of America.
15 (9) Enforcement of the provisions of paragraphs 5, 6, 7 and 8 of this judgment is
16 temporarily stayed pursuant to California Code of Civil Procedure §918 for a period
17 not exceeding 10 days beyond the last date on which a notice of appeal may be filed.
18 (10) The Bank shall preserve all documents, as defined in Evidence Code § 250, that are
19 necessary to enable it to identify, locate and repay plaintiff and class members.
20 (11) The Court retains jurisdiction to determine the amount of reasonable attorneys fees
21 and costs payable to plaintiffs and class counsel pursuant to Civil Code section
22 1780(d), Civil Code section 1021.5 or any other statutory or other legal basis, as
23 well as to determine the costs to which plaintiffs are entitled from Bank of America
24 pursuant to Code of Civil Procedure section 1032(b). The Court further retains
25 jurisdiction to make such other orders or rulings as are necessary to implement or
26
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28



1 enforce the terms of this judgment, including the Bank's efforts to identify, locate
2 and pay the amounts owed to class members described in paragraphs 6 and 7, above.

- 3 (11) Cross-defendant Paul Miller, and the Cross-defendant class, are entitled to judgment
4 on Bank of America's cross-complaint for declaratory relief.
5

6
7 DATED:

March 4, 2008 *Anne Bouliane*

Hon. Anne Bouliane
Judge of the Superior Court



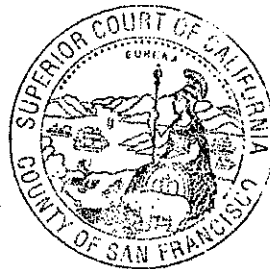


EXHIBIT A

FILED
San Francisco County Superior Court

FEB 25 2004

**IN THE SUPERIOR COURT
CITY AND COUNTY OF SAN FRANCISCO
STATE OF CALIFORNIA**

GORDON PARK-LI, Clerk
Deputy Clerk

MILLER

Plaintiff,

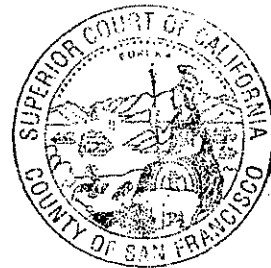
vs.

BANK OF AMERICA

Defendant.

Case# CGC-99-301917

VERDICT



ORIGINAL

VERDICT FORM
Miller V. Bank of America
San Francisco Superior Court Case No. 301917



I. INTENTIONAL MISREPRESENTATION

1. Did Bank of America make a false representation of an important fact to members of the class?

☒ Yes ☐ No

If your answer to question 1 is yes, then answer question 2. If you answered no, answer no further questions in Section I and go to Section II.

2. Did Bank of America know that the representation was false, or did it make the representation recklessly and without regard for its truth?

☒ Yes ☐ No

If your answer to question 2 is yes, then answer question 3. If you answered no, answer no further questions in Section I and go to Section II.

3. Did Bank of America intend that members of the class rely on the representation?

☒ Yes ☐ No

If your answer to question 3 is yes, then answer question 4. If you answered no, answer no further questions in Section I and go to Section II.

4. Did members of the class reasonably rely on the representation?

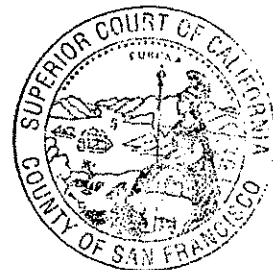
☒ Yes ☐ No

If your answer to question 4 is yes, then answer question 5. If you answered no, answer no further questions in Section I and go to Section II.

5. Was reliance by the class on Bank of America's representations a substantial factor in causing harm to the class?

☐ Yes ☒ No

If your answer to question 5 is yes, then answer question 6. If you answered no, answer no further questions in Section I and go to Section II.



6. What are the damages to the class?

a. Economic loss \$ _____

II. NEGLIGENT MISREPRESENTATION

1. Did Bank of America make a false representation of an important fact to members of the class?

☒ Yes ☐ No

If your answer to question 1 is yes, then answer question 2. If you answered no, answer no further questions in Section II and go to Section III.

2. Did Bank of America have reasonable grounds for believing the representation was true when it made it?

☐ Yes ☒ No

If your answer to question 2 is no then answer question 3. If you answered yes, answer no further questions in Section II and go to Section III.

3. Did Bank of America intend that the class rely on the representation?

☒ Yes ☐ No

If your answer to question 3 is yes, then answer question 4. If you answered no, answer no further questions in Section II and go to Section III.

4. Did the class reasonably rely on the representation?

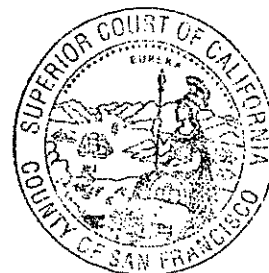
☒ Yes ☐ No

If your answer to question 4 is yes, then answer question 5. If you answered no, answer no further questions in Section II and go to Section III.

5. Was reliance by the class on Bank of America's representations a substantial factor in causing harm to the class?

☐ Yes ☒ No

If your answer to question 5 is yes, then answer question 6. If you answered no, answer no further questions in Section II and go to Section III.



6. What are the damages to the class?

a. Economic loss \$ _____

III. CONSUMER LEGAL REMEDIES ACT (CLRA)

1. Did Bank of America falsely represent that its direct deposit accounts are safe and secure for holding government benefits and that the funds in those accounts are instantly available to the account holder?

____ Yes ☒ No

If your answer to question 1 is yes, then answer question 2. If you answered no, answer no further questions in Section III and go to Section IV.

2. Did Bank of America make the representation in a transaction which was intended to result in, or actually resulted in, members of the class opening and/or maintaining a direct deposit account to hold his government benefits income?

____ Yes ____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, answer no further questions in Section III and go to Section IV.

3. What are the damages to the class?

\$ _____

4. Did the class suffer substantial economic or emotional damage resulting from the Bank's conduct?

____ Yes ____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, answer no further questions in Section III and go to Section IV.

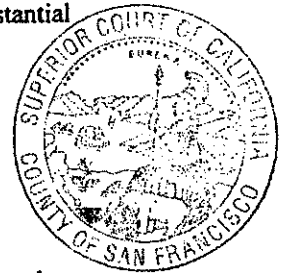
5. Do you find an additional award is appropriate?

____ Yes ____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, answer no further questions in Section III and go to Section IV.

6. What additional amount (up to \$5,000 per class member who suffered substantial economic or emotional damage) do you award?

\$ _____



IV. CONSUMER LEGAL REMEDIES ACT

1. Did Bank of America falsely represent that it has the right to use Social Security funds from direct deposit accounts that receive government benefits, including Social Security funds, to pay overdrafts, insufficient funds fees (NSFs), and money claims it has against class members?

☒ Yes ☐ No

If your answer to question 1 is yes, then answer question 2. If you answered no, answer no further questions in Section IV and go to Section V.

2. Did Bank of America make the representation in a transaction which was intended to result in, or actually resulted in, members of the class opening and/or maintaining a direct deposit account to hold his government benefits income?

☒ Yes ☐ No

If your answer to question 2 is yes, then answer question 3. If you answered no, answer no further questions in Section IV and go to Section V.

3. What are the damages to the class?

\$ 75,077,836.00

4. Did the class suffer substantial economic or emotional damage resulting from the Bank's conduct?

☒ Yes ☐ No

If your answer to question 4 is yes, then answer question 5. If you answered no, answer no further questions in Section IV and go to Section V.

5. Do you find an additional award is appropriate?

☒ Yes ☐ No

If your answer to question 5 is yes, then answer question 6. If you answered no, answer no further questions in Section IV and go to Section V.

6. What additional amount (up to \$5,000 per class member who suffered substantial economic or emotional damage) do you award?

\$ 1000.00

V. EMOTIONAL DISTRESS DAMAGES FOR PLAINTIFF PAUL MILLER

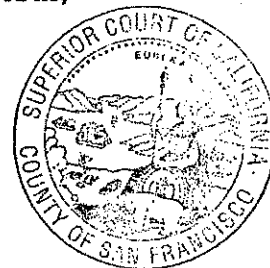
1. Did plaintiff Paul Miller suffer emotional distress as a result of the Bank of America's conduct?

✓ Yes No

If your answer to question 1 is yes, then answer question 2. If you answered no, answer no further questions in Section V and go to Section VI.

2. What are plaintiff Paul Miller's damages for emotional distress?

\$ 275,000.00




VI. PUNITIVE DAMAGES

1. Have plaintiffs shown by clear and convincing evidence that punitive damages should be awarded against Bank of America?

Yes No ✓

Have the presiding juror sign and date this form when completed.

Signed: 
Presiding Juror

Dated: February 25, 2004

SUPERIOR COURT OF CALIFORNIA
County of San Francisco

FILED
San Francisco County Superior Court
MAR 4 - 2005

PAUL MILLER, individually and on behalf of others
similarly situated

Plaintiff(s)

vs.

BANK OF AMERICA N.T. & S.A. a California
corporation, and DOES 1-50,

Defendant(s)

GORDON PARK-LI, Clerk
Case Number: CGC-99-301917

CERTIFICATE OF MAILING

(CCP 1013a (4))

THE ANNEXED INSTRUMENT IS A
CORRECT COPY OF THE ORIGINAL
ON FILE IN MY OFFICE.
ATTEST: CERTIFIED

MAR 4 - 2005

GORDON PARK-LI, Clerk
San Francisco County Superior Court
BY **Danial Lemire** DEPUTY CLERK

I, DANIAL LEMIRE, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

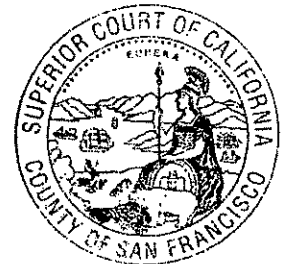
On March 4, 2005 I served the attached JUDGMENT by placing a copy thereof in a sealed envelope, addressed as follows:

JAMES C. STURDEVANT, Esq.
MARK JOHNSON, Esq.
The Sturdevant Law Firm
475 Sansome St., Suite 1750
San Francisco, CA 94111

ARNE D. WAGNER, Esq.
ARTURO GONZALEZ, Esq.
HEATHER MOSER, Esq.
Morrison & Foerster
425 Market St
San Francisco, CA 94105-2482

THOMAS J. BRANDI, Esq.
Law Offices of Thomas J. Brandi
44 Montgomery St., Suite 1050
San Francisco, CA 94104

JOSEPH S. GENSHLEA, Esq.
Weintraub Genshlea Chediak Sproul
400 Capitol Mall, Eleventh Floor
Sacramento, CA 95814



and, I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA. 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: March 4, 2005

GORDON PARK-LI, Clerk

By:

DANIAL LEMIRE, Deputy Clerk

EXHIBIT

D

A110137

Debra Sue Belaga
O'Melveny & Myers LLP
Embarcadero Ctr. West
275 Battery St.
San Francisco, CA 94111-3305

NOTICE

Please include both the appellate case number and the division number on any written communication or filing submitted to this court.

***New rule effective July 1, 2006 for Civil Appeals and Writs**

*Each party to an appeal must serve and file a Certificate of Interested Entities or Persons at the time it files its first document in this court. Each party must also include a copy of the Certificate of Interested Entities or Persons in its principal brief. The certificate must appear after the cover and before the tables. A party that learns of changed or additional information that must be disclosed must promptly serve and file a Supplemental Certificate of Interested Entities or Persons in this court. (See Cal. Rules of Court, rule 14.5.) Similar requirements apply to writ petitions. (See Cal. Rules of Court, rules 56(i), 57(c), 58(c), 59(d).)

**Our website address is
<http://appellatecases.courtinfo.ca.gov>**

dax

adda

COPY

Filed 11/20/06

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

FILED

NOV 20 2006

Court of Appeal - First App. Dist.
DIANA HERBERTBy _____
DEPUTY

PAUL MILLER et al.,

Plaintiffs and Appellants,

v.

BANK OF AMERICA, NT & SA,

Defendant and Appellant.

A110137

(San Francisco County
Super. Ct. No. 301917)

Does a bank act illegally if when balancing customer accounts, it applies credits for Social Security benefits and other public benefit payments directly deposited to its customers' checking accounts to cover debits for overdrafts and overdraft fees? In *Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352 (*Kruger*), the California Supreme Court prohibited a bank from utilizing the banker's setoff against public benefits to recover on an account holder's delinquent but separate credit card account. In this case, the trial court applied *Kruger* to prohibit the defendant Bank of America from collecting for overdrafts and fees by debiting directly deposited Social Security and other public benefit payments. This application of *Kruger* is an extension of its holding that is unwarranted in light of significant differences between the banker's setoff addressed in *Kruger* and the facts of this case. Accordingly, we reverse the judgment.

BACKGROUND

Representative plaintiff Paul Miller receives Social Security disability benefits directly deposited into his Bank of America (the Bank) checking account. In January 1998, the Bank mistakenly credited \$1,799.83 to his account. When the Bank discovered its error, it reversed or "charged back" the credit to Miller's account and he was substantially overdrawn. When Miller's May 1998 Social Security payment was directly

deposited, it was automatically balanced against the larger overdraft to reduce his negative balance.

When Miller discovered his account balance was negative, he complained to the Bank's local branch. In response the Bank opened a new account for his Social Security benefits, while leaving the negative balance in the old account, reversed the debit against his May 1998 Social Security payment, and deposited the resulting balance into the new account. But on two later occasions, the Bank again debited Miller's Social Security benefits to reduce the negative balance in his old account. Each time, after Miller complained, the Bank reversed the debits and restored the funds to Miller's account.

Miller's first amended complaint included causes of action for intentional and negligent misrepresentation, intentional infliction of emotional distress, unlawful levy against Social Security benefit payments (Code Civ. Proc., § 704.080), and violation of the Consumer Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.), the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.), and the False Advertising Act (FAA) (Bus. & Prof. Code, § 17500 et seq.). The misrepresentation-based claims were based on two alleged misrepresentations by the Bank: (1) that directly deposited Social Security benefits would be safe, secure, and instantly available to account holders; and (2) that the Bank had the right to use Social Security funds from direct deposit accounts to cover overdrafts and insufficient funds (NSF) charges.

The trial court granted summary adjudication in favor of the Bank on the claims for unlawful levy and intentional infliction of emotional distress. But it denied summary judgment on the remaining causes of action, because a trial was necessary to determine "Whether [the Bank] has a practice of debiting Social Security and other government benefit direct deposit accounts to collect overdrafts, erroneous credits or other claims or debts it has against the depositor without regard to the source of the funds in the account or the fact that the account is one into which such benefits are directly deposited." The court also found there were material issues of fact regarding whether the Bank misrepresented the safety, security and accessibility of direct deposit accounts, and whether its alleged conduct was unfair or fraudulent within the meaning of the UCL.

When it ruled on summary judgment, the court also certified a plaintiff class consisting of "All California residents who have, have had or will have, at any time after August 13, 1994, a checking or savings deposit account with Bank of America into which payments of Social Security benefits or other public benefits are or have been directly deposited by the government or its agent." In 2003, the Bank had 1,079,414 such accounts. Each month more than \$800 million in government benefits is electronically deposited into class members' accounts. Between January 1994 and May 2003, the Bank debited at least \$284,211,273 in NSF and other overdraft fees from accounts containing Social Security direct deposits.

Miller and four class members gave similar testimony at trial. Each had Social Security or disability payments directly deposited to the Bank's checking account. Like Miller, class member Barbara Washington had other funds credited to her account due to a bank error and the Bank froze her account when it discovered and reversed the error, thereby denying her access to her Social Security benefit payments. Kevin Scott Anderson, Lupe Linda Rios and William Hawkrigde each testified that their benefit payments were applied to cover overdrafts, NSF fees and service fees such as debit and automatic teller machine (ATM) fees.

Eric Kingson was called as an expert in Social Security to testify about the general characteristics of Social Security and Supplemental Social Security (SSI) recipients. In California, approximately three million people between the ages of 65 and 84 receive Social Security or SSI; another 400,000 recipients are 85 years old or older. In 2003 the average monthly Social Security benefit in California was \$900 to \$950; the maximum SSI benefit was \$757 per month.

It is undisputed that the Bank covers overdrafts and fees incurred within customers' accounts with government benefits funds that are directly deposited. William Zuendt, a 30-year banker and former president and chief operating officer of Wells Fargo Bank, described standard industry practices. Zuendt explained that all banks clear negative checking account balances from incoming deposits to those accounts irrespective of their source, including deposits of government benefits. His

uncontradicted testimony explained that it is standard practice in the banking industry to apply incoming deposits against outstanding overdrafts regardless of the source of the funds.

Zuendt testified that if state law precluded banks from using incoming deposits of benefit payments to clear negative balances,¹ banks would have to impose numerous restrictions on accounts containing government benefits to prevent them from becoming overdrawn. Dan Carretta, an executive at the Bank, described the types of restrictions that would be required. The bank would refuse to honor any checks written against insufficient funds by account holders who directly deposit benefit payments, so there would be a higher incidence of dishonored, or "bounced," checks. Other measures would include preventing such customers from using ATM cards at other banks, placing the longest permissible hold on all deposited checks to minimize the incidence of returned items, and restricting or disallowing their use of debit cards.

The trial court instructed the jury that the Bank could not apply benefit funds to overdrafts and NSF fees. Jury instruction number 20 stated that "Governmental benefits, including Social Security funds, are exempt from collection by the bank for insufficient funds fees [], overdrafts and money claims it has against the account holders. This action by the Bank is called a set-off. Funds from other sources are not exempt under this procedure."

The jury found the Bank violated the CLRA by falsely representing to depositors that it had the right to use directly deposited Social Security funds "to pay overdrafts, insufficient funds fees" and "money claims it has against class members." Based on that violation, the jury awarded the class \$75,077,836 in compensatory damages for amounts

¹ A negative balance is typically caused by honoring a check or debit transaction drawn on insufficient funds (see Cal. U. Com. Code, § 4401, subd. (a)). When an account holder overdraws his or her account, the transaction will generate a debit for the amount of the transaction and an additional debit for the bank's NSF fee. A negative balance may also result, as in the case of Mr. Miller, from a "chargeback," or the bank's reversal of an erroneous credit to an account.

collected as NSF fees, awarded statutory damages of \$1,000 for each class member “who suffered substantial economic or emotional damage” as a result of the Bank’s conduct and awarded Miller \$275,000 in emotional distress damages. On the common law misrepresentation claims, the jury found the Bank had made a “false representation of an important fact” to members of the class, but did not find reliance. It rejected Miller’s CLRA claim that the Bank “falsely represent[ed] that its direct deposit accounts are safe and secure for holding government benefits and that the funds in those accounts are instantly available to the account holder.”

While the jury was deliberating, the trial court heard additional evidence on nonjury claims under the UCL, the FAA and the CLRA. The trial court found that the Bank violated the CLRA, the UCL, and the FAA. On all counts, the court’s decision turned on the interpretation that *Kruger* prohibits banks from clearing overdrafts and NSF fees, or recovering any “other monetary claims,”² from directly deposited benefit funds. Based on this interpretation, the court concluded the Bank violated the CLRA’s prohibition against misrepresenting legal rights or remedies (Civ. Code, § 1770, subd. (a)(14)) by asserting in a booklet distributed to account holders that “[t]he law grants us the right of setoff, under certain circumstances, to use funds in your account to pay any debts you owe us.” The court also concluded the Bank violated the CLRA’s prohibition against unconscionable contract terms (§ 1770, subd. (a)(19)), by attempting to insert that statement into its agreements with class members.

The court identified three distinct violations of the UCL. It concluded the Bank’s violations of common law and the CLRA were unlawful business practices; that its account balancing practices were unfair within the meaning of Business and Professions

² The judgment seems narrower than the broader language appearing in the statement of decision in directing that the Bank is enjoined from representing it has the right to take “NSF fees or other *non-bank-fee* money claims” (italics added) from directly deposited public benefits. Neither the judgment nor the statement of decision describes the nature of these “non-bank-fee money claims,” which could conceivably have been meant to include chargebacks and overdrafts.

Code section 17500 in light of the policy that governmental benefits are exempt from collection; and that it committed a fraudulent practice by stating it had a right of setoff against its customers' accounts. The court also determined the Bank's statement about setoff violated the FAA's prohibition against untrue or misleading statements. The court rejected the Bank's affirmative defenses, including its argument that Miller's claims are preempted by federal law.

The court awarded compensatory damages and restitution of \$296,650,220, the amount of NSF fees it determined the Bank had unlawfully collected from the class, and awarded Miller \$275,000. It found "that any class member whose account was set off or assessed in violation of law has suffered substantial emotional or economic harm" under the CLRA, and was therefore entitled to a statutory damages award of \$1,000. The court enjoined the Bank from: (1) "making any representation or statement to California customers or potential customers . . . that it has the right to set off or take NSF fees or other non-bank-fee money claims it has against customers from directly deposited Social Security benefits and other public benefits in customer deposit accounts in California"; and (2) "taking any directly deposited Social Security benefits or other public benefits from customer accounts in California to satisfy NSF fees and other monetary claims it has against customers."³

³ The precise scope of the injunction is somewhat ambiguous. Does it encompass account overdrafts? It seems so. But on appeal Miller argues that it does not, emphasizing that the plaintiffs did not seek and were not awarded *damages* for the Bank's use of public benefit deposits to clear overdrafts, but, "only for the Bank's collection of [NSF] fees and other monetary claims like the collection of debts for erroneous deposits resulting from bank error." In his opposition to the Bank's petition for writ of supersedeas Miller stated clearly that "[n]othing in the judgment precludes the Bank" from clearing overdrafts against Social Security deposit accounts. We will not shift our focus and consider the scope of the injunction to reach only fees, because doing so would be inconsistent with the way Miller tried the case and the way the court decided it. It would fail to take into account the court's instruction to the jury that government benefits "are exempt from collection by the bank for insufficient funds fees . . . , *overdrafts* and money claims"; and its conclusion that the Bank violated the law by "seizing exempt Social Security funds to pay fees and *overdrafts* allegedly owed to the

The Bank filed a timely appeal. Miller cross-appealed from the denial of his claim for prejudgment interest. We issued a writ of supersedeas staying enforcement of the judgment pending appeal, and accepted amicus briefs from a number of interested groups who asked to participate on both sides of the controversy.⁴

DISCUSSION

The variety of statutory and common law offenses embodied in the judgment turn entirely on the court's determination that *Kruger* prohibits the Bank from clearing overdrafts and debiting NSF fees or other money claims in a deposit account when the credits against those charges are from government benefits directly deposited into that same account. That was the basis for the court's instruction number 20, and the resulting conclusion that the Bank misrepresented that it had the right to clear overdrafts and NSF fees from such deposits. This application of *Kruger* is also essential to conclude that the Bank violated the CLRA by attempting to enter into unconscionable contracts, and violated the UCL and the FAA by representing that it had the right to apply government benefits to reconcile an account.

Miller relies heavily upon the broadly worded holding of *Kruger* that "a bank may not exercise its right of setoff against deposits which, derived from unemployment and disability benefits, are protected from the claims of creditors." (*Kruger, supra*, 11 Cal.3d at p. 356.) This phrasing, he asserts, "was intended to prohibit a bank's setoff in all

Bank"; and the jury's finding that the Bank misrepresented that it had the right to use Social Security funds to pay overdrafts. In their reply to supersedeas, plaintiffs characterized the injunction as prohibiting the Bank from exercising a setoff against "NSF fees *and overdrafts*."

⁴ Appearing as amici curiae in support of the Bank are the American Bankers Association, America's Community Bankers, Consumer Bankers Association, Credit Union National Association, Financial Services Roundtable, Independent Community Bankers of America, California Bankers Association, California Credit Union League, and the United States of America. On behalf of the plaintiff class, we have considered amicus curiae briefs from the National Association of Consumer Advocates, The California Attorney General, Center for Responsible Lending, AARP, the National Consumer Law Center, and National Senior Citizens Law Center.

situations in which it acts as a creditor and seeks to collect exempt funds to satisfy its claims.” But “ “ “ “the language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts.” ’ ’ ’ ’ ” (*Moon v. Superior Court* (2005) 134 Cal.App.4th 1521, 1532.) The fundamental question for us is whether the Bank’s practices are sufficiently like the banker’s setoff in *Kruger* as to fall within the rule announced in that case. In other words, we must examine whether the Bank’s practices of debiting accounts containing government benefits to cover overdrafts, NSF fees and bank errors are different in ways such that they should *not* be governed by the common law rule expressed in *Kruger*.

Traditionally, the “banker’s setoff” is a common law practice derived from general principles of equity. (*Kruger, supra*, 11 Cal.3d at pp. 357, 367.) It allows a bank to set off an account holder’s funds to satisfy an existing mature obligation owing to the bank without resorting to court action. (*Gonsalves v. Bank of America* (1940) 16 Cal.2d 169, 174.) In *Kruger*, the plaintiff maintained a checking account and a separate credit card account with the defendant bank. The only funds in her checking account came from disability and unemployment benefits. The question addressed was whether the bank, using the banker’s setoff, could debit those general deposit funds to collect a debt the plaintiff owed on her credit card account.

The Supreme Court held that it could not. By statute, funds derived from state disability insurance and unemployment compensation are exempt from attachment and execution. (*Kruger, supra*, 11 Cal.3d at p. 367.) While the statutory exemption afforded to public benefit funds does not explicitly apply to the exercise of a banker’s setoff, as a matter of public policy the court extended those statutory exemptions to prohibit the common law setoff employed by the bank in that case.

The court focused on the desirability of protecting government benefit payments from third party creditors’ claims: “Although the banker’s setoff differs from attachment and execution in that it does not require the aid of a state official, there is no relevant difference between the two procedures as to the state objective of protection of unemployment compensation and disability benefits from claims of creditors. The

assertion of a banker's setoff has exactly the same effect as a third party's levy of execution on the account—it deprives the depositor of the income which the state provided him to meet subsistence expenses, compelling the state either to give him additional money or leave him without means of physical survival.” (*Kruger, supra*, 11 Cal.3d at pp. 370-371, fn. omitted.)

This concern, the court noted, had grown particularly pressing with the advent of commerce based increasingly on credit cards. “With the growth of bank-sponsored credit systems, a bank may gather unto itself the debts incurred by a depositor for past living expenses and satisfy by setoff debts which, in the days before Master Charge and Bank Americard, would have been held by many separate merchants and enforceable only through execution. To permit a bank which has thus collected the past obligations of its depositor to satisfy those claims from unemployment insurance deposits would completely defeat the state policy of preserving such deposits for the daily living expenses of the depositor.” (*Kruger, supra*, 11 Cal.3d at p. 371, fn. omitted.) *Kruger* thus prevented banks from circumventing the statutory exemptions of government benefits from attachment and execution when collecting credit card debts through setoff.

We agree with the trial court that this case implicates to some extent the legislative preference at stake in *Kruger* to safeguard a basic subsistence-level income stream for recipients of public benefits. But allowing a bank to balance overdrafts, collect NSF fees and correct bank errors against deposits to the account in which they were incurred, even deposits of exempt funds, does not enable the bank to collect the customer's third party debts to multiple creditors as did the setoff addressed in *Kruger*. (*Kruger, supra*, 11 Cal.3d at p. 371.) We realize that debiting overdrafts and associated bank fees can cause serious financial distress to recipients of public benefits. Plaintiffs introduced evidence at trial that the likelihood and gravity of such financial distress may be compounded by the Bank's practice of paying the largest checks or charges first. Because the larger items are more likely to overdraw an account, subsequently processed smaller checks which may

otherwise have cleared will cause additional overdrafts and NSF fees.⁵ But debiting an account holder's deposit to cover a check written on the same account does not present the same risk of circumventing the exemptions of public benefit funds from attachment and execution the Supreme Court addressed in *Kruger*.

There are other significant differences between this case and *Kruger*. Unlike the setoff against a credit card debt prohibited there, the judgment here would enjoin a basic method of balancing within a single account. This is not simply a distinction without a difference or a matter of creative accounting. Maintaining a deposit account, especially one with overdraft protection, inherently requires ongoing adjustment of the account balance to reflect debits, including payments and fees, and credits. As has been said in different contexts, it is common knowledge that bank statements on checking accounts "consist of debit and credit entries based on the deposits received, the checks written and the service charges to the account." (*People v. Lugashi* (1988) 205 Cal.App.3d 632, 642; see *Seibert v. Sears, Roebuck & Co.* (1975) 45 Cal.App.3d 1, 16 ["the 'outstanding balance' of any account is a net total shown to be owed when debits and credits in the account are compared"]; *Peoples Finance Etc. Co. v. Bowman* (1943) 58 Cal.App.2d 729, 734 [accounting generally means balancing credits and debits].) "The term 'account' involves the idea of debt and credit, and the balance of an account is the result of the debit and credit sides of the account, which constitutes a debt or claim, for which the party in whose favor it exists has the right of recovery." (*Millet v. Bradbury* (1895) 109 Cal. 170, 173-174.)

Collecting a debt unrelated to the bank account, such as a credit card debt, does not implicate the internal balancing of a single bank account. Neither Miller nor his various supporting amici curiae have cited, and we have not found, a single case that interprets *Kruger* to prohibit a bank from applying a deposit against a negative balance in a single bank account, or towards fees assessed because of that negative balance; indeed,

⁵ While this practice may be longstanding, it appears to work significant hardship on small depositors. However, its legality and propriety, although raised peripherally in this litigation, are not now before the court.

the *distinction* between that practice and the banker's setoff against an independent account that was of concern in *Kruger* was observed in a closely related context. In *Lopez v. Washington Mut. Bank, FA* (9th Cir. 2002) 302 F.3d 900, the Ninth Circuit concluded that federal law exempting Social Security benefits from seizure⁶ did not prohibit a bank from debiting a customer's account for overdrafts and NSF fees. (*Id.* at pp. 902-906.) The court expressly distinguished a Tenth Circuit Court of Appeals case holding a credit union could not set off Social Security benefits in a customer's checking account against the customer's obligation to the bank on a separate loan. (*Id.* at p. 906.) That situation was different, the court observed, because that loan obligation was "a separate, pre-existing debt *unrelated to the operation of the depositor's checking account*," and there was no indication the depositor had ever consented to pay that debt from his independent checking account. (*Ibid.*, italics added.) This distinction is consistent with the accepted meaning of setoff, which has traditionally been defined to mean a counterdemand "*growing out of an independent transaction.*"⁷ (See Black's Law

⁶ Title 42 of the United States Code, section 407(a) provides: "The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." (See also 42 U.S.C. § 1383(d)(1) [SSI benefits].)

⁷ Nomenclature, of course, is not everything. We emphasize that our analysis does not hinge on whether the challenged practice is referred to as "setoff," "internal account balancing," "seizure," or some other moniker. Indeed, the term "setoff" itself may convey different meanings in different legal and factual contexts. (See generally *In re Hancock* (Bankr. N.D.Okl. 1992) 137 B.R. 835, 839-841.) In the words of Justice Cardozo, "The right of set-off . . . is not susceptible of definition in the abstract without reference to the time or occasion of the controversy or the relation of the suit to the primary proceeding . . . varying with the needs of the occasion. . . . [¶] . . . When things are called by the same name it is easy for the mind to slide into an assumption that the verbal identity is accompanied in all its sequences by identity of meaning. . . . [W]e disclaim . . . a willingness to put the law into a strait-jacket by subjecting it to a pronouncement of needless generality." (*In re Hancock*, *supra*, at pp. 840-841, quoting *Lowden v. N. W. National Bank* (1936) 298 U.S. 160, 164-166.) For our purposes today,

Dict. (8th ed. 2004) p. 1404, col. 2.) In fact, the bank agreed during oral argument that imposing charges unrelated to the depositor's checking account is illegal under *Kruger*.

Our Legislature also indicated that the account balancing practices at issue here are different than the banker's setoff. One year after *Kruger* was decided, a statute was enacted to impose notice requirements and other restrictions on a bank's right to set off independent debts against a customer's deposit account. Section 864 of the Financial Code⁸ requires a bank to give an account holder notice when it exercises any setoff for a debt, and an opportunity for the account holder to claim an exemption if the debt is not owing or the funds are exempt. (§ 864, subds. (c)(1) & (c)(5).) It also prohibits banks from exercising any setoff that would leave less than \$1,000 in the customer's account. (§ 864, subds. (b) & (f).) Finally, subdivision (f) allows a bank to debit a deposit account without regard to these restrictions if it obtains the customer's advance written agreement. (§ 864, subd. (f).)⁹

Key, in our view, is that this framework of restrictions on the traditional banker's setoff applies only to independent obligations—such as the credit card account involved in *Kruger*; significantly, the statute expressly *excludes* from its scope “charge[s] for bank services or a debit for uncollected funds or for an overdraft of an account imposed by a bank on a deposit account.”¹⁰ (§ 864, subd. (a)(2); see *Symonds v. Mercury Savings &*

the significant point is that there exists a conceptual and practical distinction between banking operations carried out within one account and those that involve charging debits and credits between multiple accounts.

⁸ Hereinafter section 864. We previously deferred consideration of Miller's unopposed request for judicial notice of the legislative history of section 864. We now grant that request.

⁹ The statute expressly does not affect an account holder's right to assert statutory exemptions from levy and attachment, which include the exemption for directly deposited Social Security benefits. (§ 864, subd. (h); see Code Civ. Proc., §§ 703.010, 704.080.)

¹⁰ In full, subdivision (a)(2) of section 864 states: “ ‘Debt’ means an interest-bearing obligation or an obligation which by its terms is payable in installments, which has not been reduced to judgment, arising from an extension of credit to a natural person primarily for personal, family, or household purposes, and does not mean a charge for

Loan Assn. (1990) 225 Cal.App.3d 1458, 1464, fn. 1.) Whether section 864 should be read as broadening or narrowing *Kruger* protections is irrelevant. This different treatment for overdrafts and bank charges signals the Legislature's view that internal account balancing is different from the practice of setting off separate debt against a deposit account, does not implicate the same considerations, and does not warrant the same legal treatment.

There was also considerable testimony that extending *Kruger* to internal account balancing practices would have adverse consequences not implicated in the context of a traditional banker's setoff. Bank witnesses testified that prohibiting a bank from debiting an account for overdrafts, chargebacks and NSF fees when a customer account contains directly deposited public benefits will cause banks to substantially curtail the services available to such account holders. Consequences might include dishonoring any checks that would overdraw those accounts instead of offering overdraft protection; dishonoring other payment requests, such as automatic bill payments, that could overdraw the account; placing maximum holds on deposited funds; forbidding online or telephone banking; and canceling or restricting account holders' use of ATM and debit cards.

The United States also weighed in on the issue. The Treasury Department expressed similar concerns on behalf of the federal government. According to the Treasury, the injunctive relief would likely cause banks to reduce the range of services available to recipients of government benefits in order to minimize the risk of overdrafts, or cause higher prices for such services, working a significant detriment on both the plaintiff class and the general public interest. Other approaches banks potentially could take to address the increased risk of loss from overdrafts would include requiring account holders to maintain a segregated balance of nonbenefit funds in their accounts or attempting to return direct deposits of benefits that are directed to overdrawn accounts and instead requiring deposit by check. These changes, the Treasury says, would

bank services or a debit for uncollected funds or for an overdraft of an account imposed by a bank on a deposit account."

undermine the federal government's goals of affording recipients of public benefits the same consumer protections offered other account holders and encouraging financial institutions to offer electronic banking services, including direct deposit, to individuals who traditionally do not use banks. There is no indication that any such consequences were implicated in *Kruger*.

Amici curiae dismiss the Bank's predictions of serious consequences for low income customers as self-serving, "sky is falling" exaggeration. As a reviewing court, we acknowledge that it was within the trial court's purview to give such testimony little weight. But that these considerations are debatable, and being debated, is itself an indication that the situation involves complex considerations not present in *Kruger*. We heed the warning in *Lazzareschi Inv. Co. v. San Francisco Fed. Sav. & Loan Assn.* (1971) 22 Cal.App.3d 303, 311, that deciding whether to extend the rule announced in *Kruger* to the present context "is better accomplished by statute or by regulation authorized by statute than by *ad hoc* decisions of the courts. Legislative committees and an administrative officer charged with regulating an industry have better sources of gathering information and assessing its value than do courts in isolated cases." (See also *California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205, 218.) Different considerations apply to, and different consequences may well flow from, the regulation of the different practices involved in *Krueger* and this case. In view of those differences, it is not surprising that in the 30 plus years since *Kruger* was decided, no other court, until now, has construed *Kruger* to apply to the management of debits and credits within a single account. This is a complex and heavily regulated area more suited to legislative than judicial action so we conclude the trial court erred by finding *Kruger* governs this significantly different situation. Because that ruling is fundamental to the verdicts on all counts, the judgment is reversed in its entirety.¹¹

¹¹ We therefore do not reach issues of federal preemption, the damages award, and the Bank's defense and counterclaim of setoff. Plaintiffs' cross-appeal is mooted by our resolution of the main appeal.

DISPOSITION

The judgment is reversed. Each party to bear their own costs.

Siggins, J.

We concur:

McGuinness, P.J.

Parrilli, J.

Miller v. Bank of America, NT & SA, A110137

Trial Court: San Francisco County Superior Court

Trial Judge: Honorable Anne Bouliane

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EXHIBIT

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DEPARTMENT 212

Attorneys for Plaintiffs and the Plaintiff Class

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN FRANCISCO
UNLIMITED JURISDICTION

SCOTT ANDERSON, PAUL MILLER,
WILLIAM HAWKRIDGE, individually
and on behalf of others similarly situated,

Plaintiffs,

vs.

BANK OF AMERICA N.A., and DOES 1 - 50,

Defendants.

CASE NO. CEC - 05 - 438769

CLASS ACTION

COMPLAINT FOR FRAUD;
NEGLIGENT MISREPRESENTATION;
VIOLATION OF PUBLIC POLICY;
VIOLATION OF CODE OF CIVIL
PROCEDURE §§ 1750, *et seq.*;
VIOLATION OF BUSINESS AND
PROFESSIONS CODE §§ 17200, *et seq.*;
VIOLATION OF BUSINESS AND
PROFESSIONS CODE §§ 17500, *et seq.*

INTRODUCTION

Plaintiffs Scott Anderson, Paul Miller and William HawkrIDGE, by and through their attorneys, bring this action on behalf of themselves and a class of similarly-situated persons to challenge defendant Bank of America's unlawful, unfair and fraudulent policy and practice of collecting from Social Security and public benefit direct deposit accounts and assessing unlawful and unfair overdraft and insufficient fees ("NSF") against Social Security and public benefit direct deposit accounts. Defendant's actions

1 violate California statutes, as well as the law established in *Kruger v. Wells Fargo Bank* (1974)
2 11 Cal.3d 352 that Social Security and other public benefits for the essential needs of their recipients are
3 exempt from a bank's setoff. Plaintiffs seek compensatory and punitive damages, restitution, declaratory
4 and injunctive relief, and attorneys' fees, costs and expenses.

5 PARTIES

6 1. Plaintiff Scott Anderson is an individual, residing at all relevant times in Santa Cruz
7 County, California.

8 2. Plaintiff Paul Miller is an individual residing at all relevant times in the City and County
9 of San Francisco, California.

10 3. Plaintiff William Hawkridge is an individual residing at all relevant times in Rio Linda,
11 Sacramento County, California.

12 4. Each of the named plaintiffs are consumers who, at some time since January 1, 2004,
13 have had a checking or savings account with Bank of America in California into which "Social Security
14 benefits" or "public benefits", as those terms are defined in Code of Civil Procedure section
15 704.080(a)(2), have been directly deposited by the government or its agent. (Referred to hereafter as
16 "Direct Deposit Accounts").

17 5. At all times material herein, plaintiffs' Social Security benefits and public benefits from
18 the U.S. government or other government agency were directly deposited into their account with
19 defendant Bank of America on a monthly basis. Defendant Bank of America has repeatedly collected
20 from each of plaintiffs' Direct Deposit Accounts debts allegedly owed by them to Bank of America,
21 including charges for overdrafts on the account, in violation of California public policy.

22 6. At the time this action was filed and at material times alleged herein, defendant Bank of
23 America, N.A. ("Bank of America") was a national bank, doing business in San Francisco, California
24 and throughout the state of California. At all times relevant to this action Bank of America has been and
25 is engaged in a nationwide business of marketing and providing banking and other financial services,
26 including Direct Deposit Accounts. Bank of America has offices and does business throughout
27 California, including in San Francisco County. Bank of America affirmatively solicits Social Security
28 Direct Deposit customers residing in the State of California, and provides services to and collects

1 payments from such customers.

2 7. Plaintiffs are ignorant of the true names and capacities of defendants sued herein as
3 DOES 1-50, and therefore sues these defendants by such fictitious names. Plaintiffs will amend their
4 complaint to state the true names and capacities when ascertained. Plaintiffs are informed and believe
5 that each of the fictitiously named defendants is responsible in some manner for the occurrences and
6 damages alleged herein, and that plaintiffs' damages as hereinafter set forth were proximately caused by
7 said defendants.

8 8. Plaintiffs are informed and believe and thereon allege that each of the defendants acted in
9 concert with each and every other defendant, intended to and did participate in the events, acts, practices
10 and courses of conduct alleged herein, and was a proximate cause of damage and injury thereby to
11 plaintiffs as alleged herein.

12 9. At all times herein mentioned, each defendant was the agent or employee of each of the
13 other defendants and was acting within the course and scope of such agency or employment.

14 **ALLEGATIONS COMMON TO ALL CAUSES OF ACTION**

15 10. On or about August 13, 1998 a class action was filed in this Court against Bank of
16 America, N.A. formerly known and sued as Bank of America, N.T. & S.A., on behalf of approximately
17 1.1 million Bank of America customers. The action, *Miller v. Bank of America*, Case No. 301917
18 ("*Miller*"), alleged on behalf of plaintiff Paul Miller and the class persons that the Bank engaged in
19 unlawful, unfair and fraudulent conduct in violation of the Unfair Competition Law ("UCL"), Business
20 and Professions Code section 17200 *et seq.*; false and deceptive advertising in violation of the False
21 Advertising Act ("FAA"), Business and Professions Code section 17500 *et seq.*; and deceptive practices
22 in violation of the Consumer Legal Remedies Act ("CLRA"), Civil Code section 1750 *et seq.*

23 11. On or about October 16, 2002, this Court certified a class in *Miller* consisting of the
24 following persons:

25 All California residents who have, have had, or will have, at any time after
26 August 13, 1994, a checking or savings deposit account with Bank of
27 America into which payments of Social Security benefits or other public
28 benefits are or have been directly deposited by the government or its agent.

1 12. On or about February 25, 2004, following a jury trial in *Miller*, the jury issued a verdict,
2 with findings of fact. The verdict awarded damages to the plaintiff class in the amount of
3 \$75,077,836.00 for amounts unlawfully collected from the plaintiff class by the defendant in the form of
4 non-sufficient funds fees ("NSF fees") set off and taken from Direct Deposit Accounts in violation of the
5 law through December 31, 2003. The jury also awarded an additional sum of \$1,000.00 per class
6 member as statutory damages pursuant to Civil Code section 1780(b).

7 13. On or about December 30, 2004, having heard additional evidence on the non-jury
8 claims, the Court in *Miller* issued a Statement of Decision finding that Bank of America had violated the
9 CLRA and the UCL and awarding the plaintiff class the sum of \$284,385,741.00 in damages and
10 restitution, representing NSF fees unlawfully collected through December 31, 2003, plus interest
11 thereon. The Court also awarded the plaintiff class the additional amount of \$1,000.00, plus interest, for
12 each class member whose account was unlawfully assessed an NSF fee through the date of December
13 31, 2003.

14 14. Since December 31, 2003, Bank of America has continued to engage the conduct which
15 the jury and the Court found unlawful in *Miller* for which damages and restitution were awarded through
16 the end of 2003. Although the Court in *Miller* directed that Bank of America be "enjoined from setting
17 off or collecting NSF fees and other monetary claims from directly deposited Social Security funds and
18 public benefits," judgment has not yet been issued and the Court's Statement of Decision stays
19 enforcement of the injunction for a period which extends 10 days beyond the last date on which a notice
20 of appeal may be filed. Accordingly, Bank of America has continued to unlawfully collect NSF fees
21 from Direct Deposit Accounts since December 31, 2003, in an amount estimated to exceed 3 million
22 dollars per month. None of those unlawfully collected sums are the basis for or are included in the
23 monetary award in *Miller*.

24 15. Bank of America knew at all times relevant herein that each of the plaintiffs received
25 Social Security benefits or public benefits from the federal government or other government agency.

26 16. Bank of America never notified plaintiffs that their Social Security benefit payments or
27 other public benefits were entitled to any special protection or treatment.

28 17. Electronic funds transfer direct deposits, including direct deposits of Social Security and

1 public benefits, have become, and will continue to be, a lucrative source of income for banks and other
2 financial institutions, including without limitation Bank of America, because of the large number of
3 recipients of federal wages, salaries, retirement benefits and other benefits and payments. Plaintiffs are
4 informed and believe and thereon allege that this revenue stream is a significant incentive for Bank of
5 America to keep Direct Deposit Accounts open despite overdraft and return activity that would
6 otherwise warrant closing the accounts and to continue to assess and collect as a creditor charges against
7 the accounts for unpaid debts. Bank of America has the power to close accounts without notice if, in the
8 discretion of Bank of America, overdraft and return activity or outstanding obligations warrant such
9 action.

10 18. Plaintiffs are informed and believe and thereon allege that Bank of America has
11 established more than one million Direct Deposit Accounts for recipients of Social Security benefits and
12 other public benefits. Bank of America charges and collects substantial service fees for each of these
13 accounts.

14 19. Plaintiffs are informed and believe and thereon allege that many of the recipients of
15 Social Security benefits and public benefits who have Direct Deposit Accounts with Bank of America
16 for such benefits are senior citizens, as defined by California Civil Code § 1761 (f) and California
17 Business and Professions Code § 17206.1 (b) (1), and/or disabled persons, as defined by California Civil
18 Code § 1761 (g) and California Business and Professions Code § 17206 (b) (2).

19 20. Plaintiffs are further informed and believe and thereon allege that Bank of America,
20 through advertising, brochures and other promotional materials, has represented to its direct deposit
21 customers and applicants for such accounts that its Direct Deposit Accounts are safe and secure, that
22 funds in those accounts are instantly available, that customers will have immediate access to the funds
23 deposited to their accounts, and they could be assured that their money would be in the account.

24 21. Plaintiffs are further informed and believe and thereon allege that Bank of America has
25 not notified any customers or potential customers of Social Security benefit direct deposit, through
26 advertising or other means, that such benefits are exempt under California law from the Bank's efforts to
27 collect debts or assert claims against funds in those accounts, including NSF fees. Bank of America has
28 not notified these customers and potential customers that despite California law exempting these

1 accounts from collection proceedings by creditors it will seize funds in those accounts to cover the
2 Bank's claims against those customers.

3 22. Plaintiffs are further informed and believe and thereon allege that many of the Bank of
4 America customers who own, maintain and use Direct Deposit Accounts are unable, through age,
5 infirmity and/or lack of understanding, to fully comprehend the nature and extent of charges, including
6 but not limited to substantial recurring and escalating overdraft and return charges, and unauthorized
7 collections, and other adverse consequences that could be and/or have been imposed upon Direct
8 Deposit Account holders by Bank of America.

9 23. Bank of America has knowingly and willfully collected from plaintiffs' Social Security
10 benefit Direct Deposit Accounts monies allegedly owed to it.

11 24. As a result of the practices described above, plaintiffs and other Bank of America
12 customers who are members of the class have been damaged in that Bank of America has taken and
13 denied access to monies that are exempt from collection and intended to be available exclusively to the
14 beneficiaries of such funds and for their use. Such conduct as alleged herein is unconscionable and
15 contrary to statute and therefore unlawful. Plaintiffs have been further damaged in that Bank of America
16 has deprived them of access to Social Security benefits and other public benefits in their accounts and
17 plaintiffs have been unable to purchase the goods and services for which the benefits are provided.

18 CLASS ACTION ALLEGATIONS

19 25. Pursuant to California Code of Civil Procedure § 382 and California Civil Code § 1781,
20 plaintiffs bring this action on behalf of themselves and all other persons similarly situated. The class
21 that plaintiffs represent (hereinafter the "Plaintiff Class") is composed of all California residents who
22 have or have had a Bank of America Social Security or public benefit Direct Deposit Account at any
23 time after December 31, 2003. Plaintiffs are unable to state the precise number of potential members of
24 the Plaintiff Class because that information is in the possession of defendant Bank of America.
25 Plaintiffs are informed and believe and thereon allege that the Plaintiff Class exceeds one million
26 customers and is therefore so numerous that joinder of all members would be impracticable. The exact
27 size of the Plaintiff Class, and the identity of the members thereof, are readily ascertainable from the
28 business records of Bank of America.

1 26. Questions of law and fact common to the Plaintiff Class exist that predominate over
2 questions affecting only individual members, including, *inter alia*, the following:

3 a. Whether Bank of America has knowingly and willfully deducted from Social
4 Security and public benefits Direct Deposit Accounts charges that are exempt from collection by
5 California law;

6 b. Whether the practice of Bank of America in knowingly and willfully, and/or
7 negligently, collecting monies allegedly owed to Bank of America from Direct Deposit Accounts, is
8 contrary to the law of California as reflected in *Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352;

9 c. Whether the actions and representations of Bank of America as hereinabove
10 described violate the Consumer Legal Remedies Act, California Civil Code §§ 1750, *et seq.*;

11 d. Whether the actions and representations of Bank of America as hereinabove
12 described were fraudulent or constitute negligent misrepresentations;

13 e. Whether plaintiffs and the other members of the Plaintiff Class were injured
14 financially and emotionally by reason of the unlawful, unfair and/or fraudulent conduct of Bank of
15 America and the class-wide measure of damages;

16 f. Whether plaintiffs and the other members of the Plaintiff Class are entitled to
17 injunctive relief and restitution.

18 27. The claims asserted by the named plaintiffs in this action are typical of the claims of the
19 members of the Plaintiff Class as described above; the claims arise from the same course of conduct by
20 Bank of America; and the relief sought is common.

21 28. The named plaintiffs herein will fairly and adequately represent and protect the interests
22 of the members of the Plaintiff Class. Plaintiffs have retained counsel competent and experienced in
23 both consumer protection and class action litigation.

24 29. A class action is superior to other methods for the fair and efficient adjudication of this
25 controversy, since joinder of all members is impracticable. Furthermore, because the economic damages
26 suffered by the individual class members may be relatively modest, compared to the expense and burden
27 of individual litigation, it would be impracticable for most Plaintiff Class members to seek redress
28 individually for the wrongful conduct alleged herein. There will be no real difficulty in the management

1 of this litigation as a class action.

2 **FIRST CAUSE OF ACTION FOR DAMAGES AND PUNITIVE DAMAGES**

3 **(Violation of California Civil Code §§ 1709, 1710 (Fraud, Deceit, Concealment)**

4 **Asserted on Behalf of Plaintiffs and the Plaintiff Class)**

5 30. Plaintiffs reallege and incorporate herein by reference the allegations set forth in each of
6 the foregoing paragraphs as if fully alleged herein.

7 31. At all times herein mentioned, defendant Bank of America was in the business of
8 providing banking services, including but not limited to direct deposit checking or savings accounts, to
9 the general public. Among the accounts provided were accounts into which direct deposits of Social
10 Security benefits and public benefits could be and were made.

11 32. At all times herein mentioned, Bank of America represented to class members through
12 brochures, advertisements, and other means that direct deposits were safe, that customers could be
13 assured that their directly deposited funds would be in their accounts and instantly available, and that
14 they would have immediate access to those funds.

15 33. Bank of America failed to disclose to class members and the public that it would collect
16 funds in Social Security and public benefit Direct Deposit Accounts to satisfy overdrafts, NSF or
17 overdraft fees and other debts allegedly owed to the bank, and that such funds would not be safe from
18 such collection actions nor instantly available or accessible to customers.

19 34. Bank of America also represented to customers and the public that it had the right of
20 setoff against funds in customers' Direct Deposit Accounts when in fact it had no such right under
21 applicable law to exercise a right of setoff against funds maintained in those accounts. Bank of America,
22 in fact, concealed from class members the fact that it is legally prohibited from exercising a right of
23 setoff against customers whose accounts receive direct deposit of Social Security and public benefits.
24 Bank of America had a duty to disclose this fact to class members but intentionally failed to do so. Bank
25 of America disclosed some facts, i.e. the fact that it had a general right of setoff against accounts, but
26 actively and intentionally failed to disclose the important fact, known to the bank but not class members,
27 that Social Security and public benefits are exempt from such right of setoff.

28 35. Bank of America's representations and omissions were untrue in that at all times material

1 herein Bank of America unlawfully collected monies from Social Security and public benefit Direct
2 Deposit Accounts in violation of California law as reflected in *Kruger v. Wells Fargo Bank* (1974) 11
3 Cal.3d 352, thereby making the Direct Deposit Accounts unsafe and insecure and rendering instant
4 access to their Social Security and public benefits by account holders unreliable.

5 36. Bank of America made the representations and omissions herein alleged with the
6 intention of inducing the public, including but not limited to plaintiffs and members of the class, to open,
7 maintain, and use Bank of America's Direct Deposit Accounts.

8 37. Plaintiffs were aware of Bank of America's representations herein alleged and relied on
9 them and the alleged omissions in opening and maintaining their Direct Deposit Accounts with Bank of
10 America.

11 38. At the time Bank of America made the representations herein alleged, Bank of America
12 knew that the representations were false.

13 39. Bank of America made the representations herein alleged with the intention of depriving
14 plaintiffs of property or legal rights, to wit: the use of some or all of their Social Security and public
15 benefits which were or are deposited into their Direct Deposit Accounts, causing injury. This conduct of
16 Bank of America was fraudulent.

17 40. As a proximate result of Bank of America's intentional misrepresentations, plaintiffs
18 were damaged by suffering the loss of some of their Social Security and public benefits and by being
19 unable to readily acquire, possess, and use the goods and services ordinarily paid for by their Social
20 Security and public benefits, in an amount to be proved at trial.

21 41. The wrongful conduct of Bank of America, as herein alleged, was intentional and was
22 done with malicious, oppressive or fraudulent intent. Plaintiffs are therefore entitled to recover punitive
23 damages.

24 **SECOND CAUSE OF ACTION FOR DAMAGES**

25 **(For Negligent Misrepresentation, Asserted on Behalf of Plaintiffs and the Plaintiff Class)**

26 42. Plaintiffs reallege and incorporate herein by reference the allegations set forth in each of
27 the foregoing paragraphs, except for paragraph 38, as if fully alleged herein.

28 43. At the time Bank of America made the misrepresentations herein alleged, Bank of

1 America had no reasonable grounds for believing the representations to be true.

2 44. As a proximate result of Bank of America's negligent misrepresentations, plaintiffs were
3 damaged by suffering the loss of some of their Social Security and public benefits and by being unable to
4 access those benefits and acquire, possess, and use the goods and services ordinarily paid for by these
5 benefits, in an amount to be proved at trial.

6 **THIRD CAUSE OF ACTION FOR DAMAGES AND INJUNCTIVE RELIEF**

7 **(Violation of the Public Policy, Asserted on Behalf of Plaintiffs and the Plaintiff Class)**

8 45. Plaintiffs reallege and incorporate herein by reference the allegations set forth in each of
9 the foregoing paragraphs as if fully alleged herein.

10 46. The law of the state of California is to recognize that certain government benefits such as
11 unemployment insurance, Social Security, disability benefits and other public benefits are intended to
12 provide essential financial assistance to those in need. *See Kruger v. Wells Fargo Bank* (1974) 11
13 Cal.3d 352.

14 47. The law of the state of California also is to protect government benefits such as
15 unemployment insurance, Social Security, disability benefits and other public benefits from seizure by
16 creditors so that such benefits may be used by their recipients, including individuals who are retired
17 and/or disabled, to pay their current living expenses. *See Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d
18 352.

19 48. Defendant Bank of America's knowing and willful seizure of plaintiffs' Direct Deposit
20 Accounts' funds consisting of Social Security and public benefits violates California law established in
21 *Kruger*.

22 49. Defendant Bank of America's knowing and willful seizure of social security and/or
23 disability benefits causes damage to plaintiffs and members of the class, in that they are thereafter
24 deprived of access to the benefits and are unable to use the benefits for their subsistence, the purpose for
25 which the benefits are provided.

FOURTH CAUSE OF ACTION FOR RESTITUTION AND INJUNCTIVE RELIEF
**(Violation of the Consumer Legal Remedies Act, California Civil Code § 1750, *et seq.*,
on Behalf of Plaintiffs and the Plaintiff Class)**

50. Plaintiffs reallege and incorporate herein by reference the allegations set forth in each of the foregoing paragraphs as if fully alleged herein.

51. The Consumer Legal Remedies Act, California Civil Code § 1750, *et seq.* (hereinafter “the CLRA”), was designed to protect consumers from unfair and deceptive business practices. To this end, the CLRA sets forth a list of unfair and deceptive acts and practices that are specifically prohibited in any transaction intended to result in the sale or lease of goods or services to a consumer. The provisions of the CLRA may not be waived by any consumer. Civil Code § 1751. Cal. Civil Code § 1770. Defendant Bank of America’s acts and practices, as hereinabove described, violate the following provisions of the CLRA, without limitation:

a.) § 1770 (a) (5) in that Bank of America represented that the services (Direct Deposit Accounts) have characteristics, uses, benefits or qualities which they do not have, to wit: safety, security and instant availability;

b.) § 1770 (a) (7) in that Bank of America represented that the services (Direct Deposit Accounts) are of a particular standard and quality of safety, security and reliability that the accounts did not possess;

c.) § 1770 (a) (13) in that Bank of America made false and misleading statements concerning the safety, security and reliability of its Direct Deposit Accounts;

d.) § 1770 (a) (14) in that Bank of America represented that the banking transactions arising out of its Direct Deposit Accounts conferred rights and remedies which they did not have or which are prohibited by law, namely *Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352;

e.) § 1770 (a) (19) in that Bank of America attempted to insert and inserted unconscionable provisions in the contract for the provision of Direct Deposit Accounts for government Social Security benefits concerning assessment and collection of fees for overdrafts and return items.

52. As a result of the unfair and deceptive acts and practices of Bank of America hereinabove described, plaintiffs and members of the Plaintiff Class have suffered substantial economic losses in an

1 amount to be proven at trial.

2 53. Pursuant to California Civil Code §§ 1780 and 1781, plaintiffs and the Plaintiff Class
3 hereby request certification of the Plaintiff Class, injunctive relief, restitution and attorneys' fees, costs
4 and expenses pursuant to California Civil Code § 1780 (d). Concurrently with the filing of this
5 complaint, pursuant to Civil Code section 1782(a), plaintiffs are taking steps to notify Bank of America
6 of the violations alleged herein and demand, on behalf of themselves and the class, that appropriate
7 remedial action be taken. Should such action not be taken within the time permitted, plaintiffs will seek
8 leave to amend the complaint to seek damages under this cause of action pursuant to Civil Code section
9 1782(d).

10 **FIFTH CAUSE OF ACTION FOR RESTITUTION AND INJUNCTIVE RELIEF**

11 **(Violation of California Business and Professions Code §§ 17200, *et seq.*,**

12 **Asserted on Behalf of Plaintiffs and the Plaintiff Class)**

13 54. Plaintiffs reallege and incorporate herein by reference the allegations set forth in each of
14 the foregoing paragraphs as if fully alleged herein.

15 55. California Business and Professions Code § 17200, The Unfair Competition Law
16 ("UCL"), defines unfair competition to include any unlawful, unfair or fraudulent business act or
17 practice. The UCL provides that a Court may order injunctive relief and restitution to class members as
18 remedies for any violation of the Act.

19 56. The business acts and practices of defendant Bank of America, as hereinabove and
20 hereinafter described, constitute an unlawful business practice in violation of the UCL for the reasons set
21 forth below, without limitation:

22 a. The acts and practices violate California Civil Code §§ 1709 and 1710 for the reasons
23 set forth in the First and Second Causes of Action, and are therefore unlawful;

24 b. The acts and practices violate California Civil Code § 1750, *et seq.*, for the reasons set
25 forth in the Third Cause of Action and are therefore unlawful.

26 c. The acts and practices violate California Business and Professions Code § 17500 for
27 the reasons set forth in the Fifth Cause of Action and are therefore unlawful.

28 d. The acts and practices violate California public policy as expressed in *Kruger v. Wells*

1 *Fargo Bank* (1974) 11 Cal.3d 352 in that they constitute an unlawful collection by defendant Bank of
 2 America against benefits from the government intended to be used by the recipient of such benefits for
 3 essential living needs and expenses.

4 57. The business acts and practices of defendant Bank of America as hereinabove described
 5 also constitute an unfair business practice in violation of the UCL in that such acts and practices are
 6 substantially injurious to consumers and offensive to established California public policy.

7 58. In addition, the business acts and practices of defendant Bank of America as hereinabove
 8 described constitute a fraudulent business practice in violation of the UCL in that such acts and practices
 9 are likely to deceive California consumers as to their legal rights and obligations with respect to
 10 protection from collection of funds in their Direct Deposit Accounts and protection from the
 11 consequences of excessive overdrafts.

12 59. Pursuant to California Business and Professions Code §17203 plaintiffs seek to enjoin
 13 these acts and practices and to obtain restitution of all funds seized from plaintiffs and the Plaintiff Class
 14 by reason of and through the use of such unlawful, unfair and fraudulent acts and practices. Pursuant to
 15 California Business and Professions Code §17203, plaintiffs, individually, and on behalf of the Plaintiff
 16 Class hereby request preliminary and permanent injunctive relief prohibiting such practices in the future,
 17 and such other orders as may be necessary to restore members of the class any money or property, real or
 18 personal, which may have been seized from them by means of such unlawful, unfair and fraudulent
 19 business practices, and to disgorge all profits defendants have earned thereby. In addition, pursuant to
 20 California Code of Civil Procedure § 1021.5, plaintiffs are entitled to recover their reasonable attorneys'
 21 fees, costs and expenses incurred in bringing this action.

22 **SIXTH CAUSE OF ACTION FOR RESTITUTION AND INJUNCTIVE RELIEF**

23 **(Violation of California Business and Professions Code §§ 17500, *et seq.*;**

24 **Asserted on Behalf of Plaintiffs and the Plaintiff Class)**

25 60. Plaintiffs reallege and incorporate herein by reference the allegations set forth in each of
 26 the foregoing paragraphs as if fully alleged herein.

27 61. Plaintiffs bring this Cause of Action on behalf of themselves and the Plaintiff Class.
 28 California Business and Professions Code § 17500 prohibits untrue or misleading advertising. A Court

1 may order injunctive relief and restitution as remedies for any violations of Business and Professions
2 Code § 17500 as part of the UCL.

3 62. At all times material herein defendant Bank of America has engaged in advertising to the
4 public, including plaintiffs, and offering to the public bank accounts that include Direct Deposit
5 Accounts. The advertisements include, without limitation, brochures stating, "direct deposit is
6 convenient and safe;" "you can be assured your money will be in the bank when you need it;" "you'll
7 have the security of knowing your check is in the bank;" "funds are available immediately;" "instantly
8 available;" "you can depend upon receiving your payment safely and reliably, every single month;"
9 "instant access to your money;" and "you can be assured your money is in the account." The
10 advertisements were disseminated to and received by the public, including members of the Plaintiff
11 Class, in California.

12 63. Defendant Bank of America engaged in the advertising herein alleged with the intent to
13 induce the public and class members to open, maintain and use Bank of America Direct Deposit
14 Accounts.

15 64. Defendant Bank of America's advertising was untrue or misleading and likely to deceive
16 the public in that while Bank of America stated and implied that Direct Deposit Accounts were safe,
17 secure and reliable, the aforesaid accounts were subject to appropriation by defendant Bank of America
18 itself for alleged debts owed to the bank, as well as excessive, escalating, recurring and unconscionable
19 fees, overdraft and return charges, rendering the Direct Deposit Accounts unsafe, insecure and
20 unreliable. Bank of America continued to keep open and collect fees from Direct Deposit Accounts with
21 excessive overdraft activity, thereby depriving the owners of those accounts of Social Security and
22 public benefits of access to some or all of the funds in their accounts, thus impairing their ability to
23 purchase the goods and services for which such benefits were provided.

24 65. In making and disseminating the statements herein alleged, Bank of America knew, or by
25 the exercise of reasonable care should have known, that the statements were and are untrue or
26 misleading and so acted in violation of California Business and Professions Code § 17500.

27 66. The business acts and practices of defendant Bank of America as hereinabove described
28 also constitute an unfair business practice in violation of the UCL in that such acts and practices are

1 substantially injurious to consumers and offensive to established California public policy.

2 67. In addition, the business acts and practices of defendant Bank of America as hereinabove
3 described constitute a fraudulent business practice in violation of the UCL in that such acts and practices
4 are likely to deceive California consumers, including class members, as to their legal rights and
5 obligations with respect to the safety and security of their Direct Deposit Accounts and protection from
6 collection by Bank of America and from the consequences of overdrafts.

7 68. Pursuant to California Business and Professions Code § 17535, plaintiffs seek to enjoin
8 these acts and practices and to obtain restitution of all funds seized from plaintiffs and the Plaintiff Class
9 by reason of and through the use of such false advertising. Pursuant to California Business and
10 Professions Code § 17535, plaintiffs, individually, and on behalf of all members of the general public
11 who are, have been, or may be, subjected to these unlawful, unfair, and fraudulent business acts and
12 practices of defendants, hereby requests preliminary and permanent injunctive relief prohibiting such
13 practices in the future, and such other orders as may be necessary to restore to each class member any
14 money or property, real or personal, which may have been seized from them by means of such false
15 advertising, and to disgorge all profits defendants have earned thereby. In addition, pursuant to
16 California Code of Civil Procedure § 1021.5, plaintiffs are entitled to recover their reasonable attorneys'
17 fees, costs and expenses incurred in bringing this action.

18
19 **PRAYER FOR RELIEF**

20 WHEREFORE, plaintiffs respectfully pray as follows:

- 21 1. That this Court certify this case as a class action;
- 22 2. That this Court find and declare the defendant's acts and practices as described herein to be
23 unlawful, unfair and fraudulent;
- 24 3. That plaintiffs and the Plaintiff Class be awarded compensatory damages according to
25 proof at trial, except that no damages are sought by this complaint or at this time for violations of the
26 Consumer Legal Remedies Act, Civil Code section 1750, *et seq.*;
- 27 4. That plaintiffs and the Plaintiff Class be awarded punitive damages according to proof at
28 trial, except that no such damages are sought by this complaint or at this time for violations of the

1 Consumer Legal Remedies Act, Civil Code section 1750, *et seq*;

2 6. That defendants be preliminarily and permanently enjoined from engaging in the
3 unlawful, unfair and fraudulent acts and practices alleged herein;

4 7. That defendants be ordered to make restitution to plaintiffs and all members of the
5 Plaintiff Class;

6 8. That the court make such orders as may be necessary to restore to any person in interest
7 any money or property, real or personal, which may have been seized from plaintiffs by means of such
8 unlawful, unfair and fraudulent business practices, and to disgorge all profits defendants have earned
9 thereby;

10 9. That plaintiffs and the Plaintiff Class be awarded attorneys' fees and expenses pursuant to
11 California Civil Code § 1780 and California Code of Civil Procedure § 1021.5;

12 10. That plaintiffs and the Plaintiff Class be awarded pre-judgment interest on all sums
13 collected;

14 11. For costs of suit herein incurred; and

15 12. For such other and further relief as the Court may deem proper.

16
17 DATED: February 17, 2004

THE STURDEVANT LAW FIRM
A Professional Corporation

18
19
20 By: 

21 MARK T. JOHNSON

22 Attorneys for plaintiffs and the Plaintiff Class
23
24
25
26
27

EXHIBIT

F

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Attorneys for Defendant
BANK OF AMERICA, N.A.

12

13

SUPERIOR COURT OF THE STATE OF CALIFORNIA

14

COUNTY OF SAN FRANCISCO

15

UNLIMITED CIVIL JURISDICTION

16

SCOTT ANDERSON, PAUL MILLER,
WILLIAM HAWKRIDGE, individually and on
behalf of others similarly situated,

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Plaintiffs,

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v.

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BANK OF AMERICA, N.A. and DOES 1-50,

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Defendants.

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FILED
San Francisco County Superior Court

OCT 25 2005

GORDON PARK, LI, Clerk
BY: *[Signature]* Deputy Clerk

IMPROV
OCT 25 2005

Case No. CGC-05-438769

**ORDER GRANTING DEFENDANT
BANK OF AMERICA, N.A.'S MOTION
TO STAY PROCEEDINGS**

Date: September 14, 2005

Time: 9:30 am

Dept: 301

The Honorable James L. Warren

Complaint Filed: February 17, 2005

Trial Date: Not Set

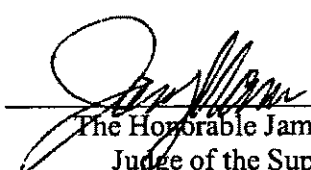
1 Defendant Bank of America, N.A.'s Motion to Stay Proceedings came on regularly for
2 hearing at 9:30 am on September 14, 2005, in Department 301 of this Court. James C. Sturdevant
3 and Mark T. Johnson of the Sturdevant Law Firm appeared for the plaintiffs; Arne D. Wagner of
4 Calvo & Clark LLP appeared for defendant. The Court having read the papers submitted in
5 connection with the motion and heard oral argument, and good cause appearing,
6

7 IT IS HEREBY ORDERED that the Motion to Stay Proceedings is granted, and that all
8 proceedings herein are stayed. The foregoing is without prejudice to the right of any party to
9 apply to ~~[Department 301 or to~~ the Discovery Commissioner of this Court for leave to propound
10 limited discovery. The taking of such discovery shall be permitted only upon a showing of good
11 cause by the requesting party that, absent such discovery, the information sought will cease to be
12 available. Either party may apply, upon a showing of good cause, to modify or terminate the stay
13 in the future. Unless so modified or terminated, the stay shall remain in force until ten days after
14 further appellate review of the Judgment entered by this court in *Miller v. Bank of America*, Case
15 No. 301917, is concluded or no longer possible. The parties shall notify the Court when that
16 event has occurred.
17

18 ~~The case management conference set for October 14, 2005 in Department 212 is vacated.~~

19 **IT IS SO ORDERED.**

20
21 Dated: 10/25/, 2005

22 
23 The Honorable James L. Warren
24 Judge of the Superior Court
25
26
27
28

EXHIBIT

G



FILED
ALAMEDA COUNTY

MAY 28 2008

CLERK OF THE SUPERIOR COURT
By *[Signature]* Deputy

JOHN L. WHEELER
GLORIA A. WHEELER
181 Hunter Avenue
Oakland, CA 94603
(510) 635-6903

Plaintiffs In Propria Persona

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA
UNLIMITED JURISDICTION

JOHN L. WHEELER, GLORIA A.
WHEELER,

Plaintiffs,

vs.

BANK OF AMERICA, N.T. & S.A. a
California corporation, and
LIBERTY REVERSE MORTGAGE and
SEATTLE FINANCIAL GROUP, and
DOES 1-10, inclusive,

Defendants.

No. *RG* 08389597

COMPLAINT FOR FRAUD, VIOLATION
OF CODE OF CIVIL PROCEDURE
§8704.080, VIOLATION OF CODE
OF CIVIL PROCEDURE §1750, ET
SEQ., VIOLATION OF CODE OF
CIVIL PROCEDURE §3294;
INTENTIONAL INFLICTION OF
EMOTIONAL DISTRESS; VIOLATION
OF BUSINESS & PROFESSIONS CODE
§17200 ET SEQ., AND VIOLATION
OF BUSINESS & PROFESSIONS CODE
§17500

Plaintiffs allege that, at all times herein relevant:

INTRODUCTION

Plaintiffs John L. Wheeler and Gloria A. Wheeler
(hereinafter "plaintiffs") bring this action to challenge
defendants' unlawful and unfair practice on debiting Social
Security Direct Deposit accounts for amounts protected from levy
law and assessing unfair and unconscionable overdraft and return
item fees from Social Security Direct Deposit Accounts.
Plaintiffs seek compensatory and punitive damages, restitution,

1 declaratory and injunctive relief, and attorney's fees, costs and
2 expenses.

3 PARTIES

4 1. Plaintiffs are residing at all relevant times in the
5 City of Oakland, County of Alameda, California. Plaintiffs are
6 consumers who have a Social Security Direct Deposit account with
7 defendant Bank of America, N.T. and S.A. (hereinafter defendant
8 Bank of America). At all times material herein, plaintiffs'
9 Social Security payments from the U. S. Government were directly
10 deposited into their accounts with defendant Bank of America once
11 each month. Defendant B of A has repeatedly levied upon
12 plaintiffs' Social Security Direct Deposit Accounts for debts
13 allegedly owed to Bank of America. Bank of America is prohibited
14 by law from levying upon Social Security direct deposit funds.

15 2. "At all material times, defendant Bank of America was
16 and is a California corporation with its principal place of
17 business in Oakland, California. Bank of America is engaged in a
18 nationwide business of marketing and providing banking and other
19 financial services, including Social Security Direct Deposit.
20 Bank of America has offices throughout California, including
21 Alameda County. Bank of America affirmatively solicits Social
22 Security Direct Deposit customers residing in the State of
23 California, and provides services to and collects payments from
24 such customers.

25 November 8, 2005, plaintiffs paid defendant Bank of
26 America \$148.53 cashier's check No. 412925025 purchased from Bank
27 of America. Plaintiffs went into Bank of America and paid.

1 On 11/8/05, plaintiffs went into Bank of the West to
2 open up a checking account. Bank of the West told plaintiffs
3 they could not open up a checking account because plaintiffs were
4 writing bad checks and non-sufficient funds. Bank of America
5 reported to Chex System and also reported to Asset Acceptance,
6 LLC debt collect this is a debt collect. Bank of America put its
7 plaintiffs credit report, saying plaintiff John L. Wheeler owed
8 them \$519.22.

9 On 6/22/06, Liberty Reverse Mortgage and Bank of
10 America settlement statement total disbursements to plaintiffs
11 \$38,406.53. Equal disbursements to borrower \$35,914.71, loan
12 amount \$191,578.83, total settlement charges \$17,257.59.
13 Defendant charged plaintiffs mortgage insurance premium for
14 SMC/FHA \$7,255.80 up front.

15 On Reverse Mortgage statement each statement they are
16 charging plaintiffs for FHA Mortgage Insurance which has already
17 been paid up front. Reverse Mortgage Account Statement Seattle
18 Savings Bank Loan Number 4393069. Bank of America charged
19 plaintiffs for FHA Mortgage Insurance each month for 11/30/07,
20 \$96.84. This money was taken out up front.

21 6/22/06 \$7,255.80 was taken out for FHA Mortgage
22 Insurance. Also charged plaintiffs \$903.00 for title insurance.

23 On 12/19/05, defendant Bank of America charged
24 plaintiffs account \$1260.00. Plaintiff John Wheeler did not get
25 this money out of the bank and he did not sign for that money.

On 6/16/06, defendant Bank of America charged plaintiffs' account \$100.00. Plaintiff John Wheeler did not sign for that money.

GROUND FOR PUNITIVE DAMAGES

Plaintiffs contend that defendant accomplished the fraud complained of through its management practices and the acts of its employees and agents. Plaintiffs further contend that the practices and acts were malicious, oppressive, and fraudulent within the meaning of California Code of Civil Procedure §3294. Accordingly, additional damages should be assessed defendant for the sake of example and by way of punishing defendant.

The relevant subdivisions of §3294 provide as follows:

- (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice. The plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing defendant.

NOTICE OF INSUFFICIENT FUNDS

<u>Date</u>	<u>Fees</u>
Dec 6, 2005	\$33.00
Dec 7, 2005	93.00
Jan 1, 2006	34.00
Feb 3, 2006	31.00
Feb 6, 2006	35.00
Feb 3, 2006	31.00
May 2, 2006	68.00
May 11, 2006	34.00
May 15, 2006	34.00
May 22, 2006	34.00
May 31, 2006	34.00
Jun 14, 2006	35.00
Jun 27, 2006	35.00
Jul 3, 2006	35.00
Jul 14, 2006	

1	Jul 17, 2006	35.00
	Jul 24, 2006	35.00
2	Nov 3, 2006.	34.00
	Jan 3, 2007	35.00
3	Jan 22, 2007	35.00
	Apr 25, 2007	70.00
4	May 1, 2007	35.00
	May 9, 2007	35.00
5	May 10, 2007	35.00
	Jul 11, 2007	133.05
6	Jul 13, 2007	35.00

7 3. Plaintiffs are ignorant of the true names and
8 capacities of defendants sued herein as DOES 1-50, and therefore
9 sues these defendants by such fictitious names. Plaintiffs will
10 amend this complaint to state the true names and capacities when
11 ascertained. Plaintiffs are informed and believe that each of
12 the fictitiously named defendants is responsible in some manner
13 for the occurrence and damages alleged herein, and that
14 plaintiffs' damages as hereinafter set forth were proximately
15 caused by said defendants.

16 4. Plaintiffs are informed and believe and thereon allege
17 that each of the defendants acted in concert with each and every
18 other defendant intended to and did participate in the events,
19 acts, practices and courses of conduct alleged herein, and was a
20 proximate cause of damage and injury thereby to plaintiffs as
21 alleged herein.

22 5. At all times herein mentioned, each defendant was the
23 agent or employee of each of the other defendants and was acting
24 within the course and scope of such agency or employment.

25 /////

26 /////

27 /////

28

FIRST CAUSE OF ACTION FOR DAMAGES AND PUNITIVE DAMAGES

(Violation of California Civil Code §§1709, 1710 (Fraud))

Asserted on Behalf of Plaintiff)

6. Plaintiffs reallege and incorporate herein by reference the allegations set forth in paragraphs 1 through 5 above as if fully alleged herein.

7. At all times herein mentioned, defendant Bank of America was in the business of providing banking services, including but not limited to bank deposit accounts, to the general public. Among the accounts provided were accounts into which direct deposits of government benefits could be and were made.

8. At all times herein mentioned, defendant Bank of America represented to the public through brochures, advertisements, and other means that their direct deposit accounts were safe and secure. Bank of America further represented to the public that direct deposit is the safest, most reliable way to deposit annuity, pension or retirement checks, including but not limited to Social Security benefits and veteran's benefits.

9. Bank of America's representations concerning safety and security were untrue in that at all time material herein, Bank of America imposed unexpected and unlawful levies, in violation of California Code of Civil Procedure §704.080, upon its direct deposit account holders, rendering the direct deposit account unsafe and insecure.

1 10. Bank of America made the representations herein alleged
2 with the intention of inducing the public, including but not
3 limited to plaintiffs, to purchase, maintain, and use Bank of
4 America's direct deposit accounts.

5 11. On 6/22/06, Seattle Mortgage Company frauded plaintiffs
6 out of \$7,255.80.

7 12. On 11/8/05, Bank of America frauded plaintiffs out of
8 \$148.53.

9 13. On 5/5/07, Bank of America reported to Asset
10 Acceptance, LLC that plaintiff John Wheeler still owed Bank of
11 America \$534.34.

12 14. Plaintiffs were aware of Bank of America's
13 representations herein alleged and relied on them in purchasing
14 and maintaining their direct deposit government benefit accounts
15 with Bank of America.

16 15. At the time Bank of America made the representations
17 herein alleged, Bank of America knew that the representations
18 were false.

19 16. Bank of America made the representations herein alleged
20 with the intention of depriving plaintiffs of property or legal
21 rights, to with: the use of some or all of their direct deposit
22 government benefits, or otherwise causing injury, and was guilty
23 of fraud.

24 17. As a proximate result of Bank of America's intentional
25 misrepresentations, plaintiffs were damaged by suffering the loss
26 of some of their government benefits and by being unable to
27 acquire, possess, and use the goods and services ordinarily paid
28

1 for by their government benefits, in an amount to be proven at
2 trial.

3 18. The wrongful conduct of Bank of America, as herein
4 alleged was intentional and was done with malicious, oppressive
5 or fraudulent intent. Plaintiffs are therefore entitle to
6 punitive damages.

7 SECOND CAUSE OF ACTION FOR DAMAGES AND PUNITIVE DAMAGES

8 (Violation of California Civil Code §§1709, 1710

9 (Negligent Misrepresentation) Asserted on Behalf of Plaintiffs

10 19. Plaintiffs reallege and incorporate herein by reference
11 the allegations set forth in paragraphs 1 through 18 above as if
12 fully alleged herein.

13 20. At the time Bank of America made the misrepresenta-
14 tions herein alleged, Bank of America had no reasonable grounds
15 for believing the representations to be true.

16 21. As a proximate result of Bank of America's negligent
17 misrepresentations, plaintiffs were damaged by suffering the loss
18 of some of their government benefits and by being unable to
19 acquire, possess, and use the goods and services ordinarily paid
20 for by their government benefits, in an amount to be proven at
21 trial.

22 THIRD CAUSE OF ACTION FOR DAMAGES AND PUNITIVE DAMAGES

23 (Violation of California Civil Code §704.080

24 Asserted on Behalf of Plaintiffs)

25 22. Plaintiffs reallege and incorporate herein by reference
26 the allegations set forth in paragraphs 1 through 21 above as if
27 fully alleged herein.

28

1 23. California Code of Civil Procedure §704.080 provides
2 that Social Security payments that are directly deposited by the
3 U.S. Government into a bank account are exempt from levy,
4 regardless of the amount of the deposit. The statute further
5 establishes that Social Security direct deposit accounts are
6 exempt from levy, without the consumer having to make a claim of
7 exemption, for amounts up to \$2,000 for a single depositor
8 account and for amounts up to \$3,000 for an account with two or
9 more depositors.

10 24. California Code of Civil Procedure §704.080(d) also
11 specifically requires a financial institution that holds a Social
12 Security direct deposit account to follow certain procedures when
13 processing a levy such that no exempt funds are seized.

14 25. Defendant Bank of America has engaged, and is
15 continuing to engage, in a business practice of unlawfully
16 debiting accounts of Social Security Direct Deposit account
17 holders for amounts sought through levy by alleged creditors,
18 including without limitation, defendant Bank of America and
19 assessing service fees for the processing of such levies. Such
20 practices violate California Code of Civil Procedure §704.080 in
21 that Social Security Direct Deposit funds are exempt from levy.

22 26. Defendant Bank of America's violation of California
23 Code of Civil Procedure §704.080 constitutes a tort in that it is
24 a breach of a non-consensual duty owed to another. California
25 Code of Civil Procedure §704.080 was enacted for the protection
26 of plaintiffs and embodies a public policy that Social Security
27 Direct Deposit accounts shall not be subject to levy.

28

1 Accordingly, defendant Bank of America's violation of said
2 statute constitutes a tort and defendant is therefore liable for
3 all damages suffered by plaintiffs.

4 27. As a result of defendant Bank of America's unlawful
5 practice, plaintiffs were denied funds to which they are
6 statutorily entitled and were charged improper service fees, and
7 have suffered substantial damages, including without limitation,
8 monetary losses.

9 28. Defendants have engaged in the aforementioned conduct
10 willfully and for the specific purpose of denying plaintiffs
11 rightful access to the funds in their accounts and collecting
12 substantial bank service fees. Defendants have thus acted with
13 oppression and malice in that they have deliberately engaged in
14 conduct that has subjected plaintiffs to cruel and unjust
15 hardship in conscious disregard of such individuals' statutory
16 rights, and have carried out such conduct with a willful and
17 conscious disregard of the rights of plaintiffs. Accordingly,
18 plaintiffs are entitled to an award of punitive damages according
19 to proof at the time of trial.

20 FOURTH CAUSE OF ACTION FOR DAMAGES AND PUNITIVE DAMAGES

21 (Intentional Infliction of Emotional Distress:

22 Asserted on Behalf of Plaintiffs)

23 29. Plaintiffs reallege and incorporate herein by reference
24 the allegations set forth in paragraphs 1 through 28 above as if
25 fully alleged herein.

26 30. Defendants knew at all relevant times that debiting a
27 Social Security Direct Deposit account pursuant to a levy and
28

1 collecting substantial bank service fees for processing such levy
2 were contrary to the law and policy of the State of California,
3 and in violation of the statutory rights of the plaintiffs.
4 Defendants further knew that plaintiffs had limited income and
5 that such acts would cause them considerable hardship and
6 emotional distress. Nevertheless, defendants committed such acts
7 deliberately and repeatedly, and with conscious disregard for the
8 rights of the plaintiffs.

9 31. As a result of defendant's acts as hereinabove
10 described, plaintiffs have suffered severe emotional distress,
11 including without limitation, anger, stress, worry, anxiety,
12 humiliation, fear, depression, fatigue and frustration.

13 32. Defendants committed the above-described wrongful and
14 intentional acts because they felt confident in their position of
15 wealth, sophistication and power, and in their ability to
16 manipulate plaintiffs and to coerce plaintiffs into relinquishing
17 rights guaranteed to them by law. Defendants deliberately,
18 willfully and maliciously pursued this course of conduct because
19 they had no fear that the plaintiffs would understand the nature
20 of the transactions and/or be able to assert their legal rights.
21 Defendants have thus acted with oppression and malice in that
22 they have engaged in despicable conduct, intended to cause cruel
23 and unjust hardship to plaintiffs, and have carried out such
24 conduct with a willful and conscious disregard of the rights of
25 plaintiffs. Accordingly, plaintiffs seek and are entitled to
26 awards of compensatory and punitive damages according to proof at
27 the time of trial.

1 33. In making and disseminating the statements herein
2 alleged, Bank of America knew, or by the exercise of reasonable
3 care should have known, that the statements were and are untrue
4 or misleading and so acted in violation of California Business
5 and Professions Code §17500.

6 34. In addition, the business and act and practices of
7 defendant Bank of America as hereinabove described constitute a
8 fraudulent business practice in violation of the UCL in that such
9 acts and practices are likely to deceive plaintiffs as to their
10 legal rights and obligations with respect to the safety and
11 security of their government benefit deposit accounts and
12 protection from levies by Bank of America and from the
13 consequences of excessive overdrafts.

14 35. Pursuant to California Code of Civil Procedure §1021.5,
15 plaintiffs are entitled to recovery their reasonable attorney's
16 fees, costs and expenses incurred in bringing this action.

17 **FIFTH CAUSE OF ACTION**

18 **(Defamation)**

19 36. Plaintiffs reallege and incorporate herein by reference
20 the allegations set forth in paragraphs 1 through 35 above as if
21 fully alleged herein.

22 37. Bank of America defamed plaintiffs by failing to remove
23 the negative entries on plaintiffs' credit reports and, upon
24 information and belief, by declaring to potential creditors of
25 plaintiffs that plaintiffs still owed money to Bank of America
26 regarding the \$148.53. Plaintiffs paid Bank of America with a
27 Bank of America cashier check dated November 8, 2005. Defendants

1 sold this account to Asset Acceptance, LLC Collection Agency.
2 The current balance is \$543.34 that plaintiffs owe.

3 38. Defendant Bank of America reported to Chex Systems that
4 plaintiffs were writing bad checks on insufficient funds.

5 39. Plaintiffs went to open up an account with Bank of the
6 West on April 9, 2004, November 8, 2005, and they refused to open
7 plaintiffs a checking account. Bank of the West said plaintiffs
8 were writing bad checks on insufficient funds.

9 40. As a result of this defamation, plaintiffs have
10 suffered the damages described in preceding paragraphs of this
11 complaint. Furthermore, Bank of America, in failing to remove
12 the negative entries contained in plaintiffs' credit report and,
13 upon information and belief, declaring to potential creditors of
14 plaintiffs that plaintiffs still owed money to Bank of America,
15 amounted to malice, fraud, and oppression within the meaning of
16 Civil Code §3294, subjecting this defendant to an award of
17 exemplary damages.

18 PRAYER FOR RELIEF

19 WHEREFORE, plaintiffs respectfully pray as follows:

20 1. That this court find and declare the defendants's acts
21 and practices as described herein to be unlawful, unfair and
22 fraudulent;

23 2. That plaintiffs be awarded compensatory damages
24 according to proof at trial;

25 3. That plaintiffs be awarded punitive damages according
26 to proof at trial;

1 Civil Code §3294, subjecting this defendant to an award of
2 exemplary damages.

3 PRAYER FOR RELIEF

4 WHEREFORE, plaintiffs respectfully pray as follows:

5 1. That this court find and declare the defendants's acts
6 and practices as described herein to be unlawful, unfair and
7 fraudulent;

8 2. That plaintiffs be awarded compensatory damages
9 according to proof at trial;

10 3. That plaintiffs be awarded punitive damages according
11 to proof at trial;

12 4. That defendants be preliminarily and permanently
13 enjoined from engaging in the unlawful, unfair and fraudulent act
14 and practices alleged herein;

15 5. That plaintiffs be awarded attorney's fees and expenses
16 pursuant to California Code of Civil Procedure §1021.5 and
17 California Civil Code §1780.

18 6. That plaintiffs be awarded pre-judgment interest on all
19 sums collected;

20 7. For costs of suit herein incurred; and

21 8. For such other and further relief as the court may deem
22 proper.

23 Dated: May 28, 2008

24 
JOHN WHEELER
Plaintiff, In Pro Per

25 
GLORIA WHEELER
Plaintiff In Pro Per